Supreme Court, U.S.
FILED
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No. 99 1740

IN THE

Supreme Court of the United States

ATLAS TURNER, INC.,

Petitioner,

versus

LINDA HAMILTON, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE HAMILTON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the District Court abuse its discretion in finding that Atlas Turner, Inc. had not waived its defense of lack of personal jurisdiction and did the Court of Appeals err in applying a *de novo* standard of review and reversing the District Court?

LIST OF PARTIES

Petitioner is Atlas Turner, Inc., a defendant in this asbestos personal injury action.

Respondent is Linda Hamilton, individually and as executrix of the Estate of George Hamilton, plaintiff in this action.

The remaining defendants are non-party respondents in this court. Garlock Inc. and Kaiser Refractories, an affiliate of Kaiser Aluminum and Chemical Corp., are defendants. AC and S, Inc.; Armstrong World Industries, Inc., formerly known as Armstrong Cork Co.; Combustion Engineering, Inc.; Owens-Corning Fiberglas, Corp.; United States Gypsum Co.; Asbestos Claims Management Corporation, formerly known as National Gypsum, Co., Turner & Newall, PLC; United States Mineral Products Company; Pittsburgh-Corning, Corporation; The Flintkote Company; Rockwool Manufacturing; TAF International Ltd.; GAF Corporation; Anchor Packing Co.; Foster Wheeler, Foster Wheeler Energy Corporation; C.E. Thurston & Sons, Inc.; Flexitalic, Inc.; A.P. Greene Industries, Inc.; Georgia Pacific, Inc.; Dana Inc.; Certainteed Corporation; W.R. Grace and Co. are Defendants-Cross Defendants.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Atlas Turner, Inc. is a wholly owned subsidiary of Mazarin, Inc. which is a publicly traded corporation.

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Petitioner Atlas Turner, Inc. ("Atlas Turner") requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated November 22, 1999, which reversed the judgment of the United States District Court for the Southern District of New York dismissing the Complaint against Atlas Turner for lack of personal jurisdiction under New York's long-arm statute.

OPINIONS BELOW

The September 23, 1998 opinion of the District Court denying Atlas Turner's pre-trial motion to dismiss for lack of personal jurisdiction is reported at 1998 U.S. Dist. LEXIS 14884 and reproduced in the Appendix at 1a. The January 5, 1999 opinion of the District Court, granting Atlas Turner's post-trial motion for dismissal based on lack of personal jurisdiction, is reported at 31 F. Supp.2d 351 and is reproduced in the Appendix at 16a. The March 11, 1999 opinion of the District Court, again granting Atlas Turner's motion to dismiss for lack of personal jurisdiction, after re-argument, is reported at 1999 U.S. Dist. LEXIS 2796 and is reproduced in the Appendix at 30a. The November 22, 1999 opinion of the Court of Appeals, reversing the judgment of the District Court is reported at 197 F.3d 58 and is reproduced in the Appendix at 44a. The January 31, 2000 order of the Court of Appeals, denying Atlas Turner's petition for rehearing/rehearing *en banc*, is unreported and is reproduced at in the Appendix at 51a.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL STATUTES AND RULES INVOLVED

28 U.S.C. § 1254(1) Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;. . .

28 U.S.C. § 1407(a) Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any such claims before the remainder of the action is remanded.

Supreme Court Rule 10(a)

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Rule 12. Defenses and Objections-When and How Presented-By Pleading or Motion-Motion for Judgment on Pleadings . . .

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter,

(2) lack of jurisdiction over the person,

(3) improper venue,

(4) insufficiency of process,

(5) insufficiency of service of process,

(6) failure to state a claim upon which relief can be granted,

(7) failure to join a party under Rule 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be, treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. . . .

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived

(A) if omitted from a motion in the circumstances described in subdivision (g), or

(B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. . .

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STATEMENT OF THE CASE

On June 15, 1994, George Hamilton filed this action in the United States District Court for the Southern District of New York, against eleven companies, alleging that he had contracted mesothelioma as a result of exposure to asbestos containing products. Because Mr. Hamilton was ill, his counsel immediately noticed and conducted his deposition. Atlas Turner did not participate in his deposition. Plaintiff also served answers to a standard set of interrogatories to which plaintiffs in asbestos litigation must respond pursuant to a standard case management order applicable to asbestos personal injury actions in that court. On July 8, 1994, Atlas Turner filed its Answer to the Complaint, asserting among its affirmative defenses lack of personal jurisdiction. Atlas Turner served no discovery requests and conducted no discovery. There were no conferences held or scheduling orders issued while the case was originally pending in the Southern District of New York.

Pursuant to 28 U.S.C. § 1407(a), in November 1994, this action was transferred by the Judicial Panel on Multidistrict Litigation to Multidistrict Litigation No. 875 which is pending in the United States District Court for the Eastern District of Pennsylvania. *See In re Asbestos Products Liability Litigation (No. VI),* 771 F. Supp. 415 (J.P.M.L. 1991). Atlas Turner did not seek transfer of this action. During the time that this action was pending before the Honorable Charles R. Weiner of the Eastern District of Pennsylvania, Atlas Turner propounded no discovery. In December 1995, plaintiff filed an Amended Complaint and served supplemental discovery responses, amending plaintiff's earlier responses to standard discovery. At no time while this action was pending before Judge Weiner did Atlas Turner file any motions.

As per his standard, highly effective practice in handling the thousands of asbestos cases transferred to him as part of Multidistrict Litigation No. 875, Judge Weiner scheduled and held several settlement conferences which included this case among other cases. 52a. Upon plaintiff's motion, in December 1997, Judge Weiner remanded this case back to the Southern District of New York along with six other cases, "for completion of necessary discovery, further mediation, A.D.R. or other proceedings. . . ." 53a- 54a.

After remand of this action to the Southern District of New York, the District Court consolidated this action with four other asbestos cases for trial in September 1998. At what Atlas Turner thought was the close of discovery, on August 3, 1998 Atlas Turner filed a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R.Civ.P. 12, and, alternatively, a motion for summary judgment. Plaintiff opposed the motions, asserting *inter alia* that Atlas Turner's delay in filing its motion to dismiss based on lack of personal jurisdiction constituted a waiver. By order filed September 23, 1998, the District Court denied Atlas Turner's motion to dismiss for lack of personal jurisdiction but granted leave to renew the motion upon a fuller record. The District Court noted that plaintiff's evidence failed to provide any information that Atlas Turner was doing business in New York at the relevant time. 6a.

A week before trial, plaintiff identified a new product identification witness. Two days prior to trial, Atlas Turner deposed the witness. This was the only deposition Atlas Turner conducted. Trial in the consolidated actions commenced on September 23, 1998 and the jury returned a verdict for plaintiff on October 20, 1998. On November 6, 1998, judgment was entered for plaintiff.

Atlas Turner filed post-trial motions including a renewed motion to dismiss for lack of personal jurisdiction. Again, plaintiff asserted *inter alia* that Atlas Turner had waived its defense of lack of personal jurisdiction. The District Court granted Atlas Turner's renewed motion to dismiss (but granted plaintiff leave to re-argue). 29a. The District Court noted that though Atlas Turner did delay in contesting personal jurisdiction, the delay was not substantial enough to

warrant finding a waiver, given the procedural history of the matter, including the three years that the matter was before Judge Weiner of the Eastern District of Pennsylvania as part of the coordinated and consolidated proceedings under MDL No. 875. 28a. Noting that Atlas Turner had raised the defense in its Answer and in its first significant motion, the District Court found that Atlas Turner had not waived the defense. 28a. The District Court also found that plaintiff had failed to establish by a preponderance of the evidence that the District Court had personal jurisdiction over Atlas Turner.

In its re-argument on the motion to dismiss, plaintiff asserted for the third time that Atlas Turner had waived its jurisdictional defense. By order and opinion filed March 11, 1999, the District Court again rejected plaintiff's assertion that Atlas Turner had waived its defense of lack of personal jurisdiction because plaintiff had failed to cite any facts or controlling authority which the District Court overlooked in granting Atlas Turner's motion to dismiss, on post-trial motions. 30a, 34a. The District Court also found that plaintiff failed to establish that the District Court had personal jurisdiction over Atlas Turner. It again granted Atlas Turner's motion to dismiss. 43a.

Plaintiff appealed the District Court's order dismissing the action against Atlas Turner. The Court of Appeals for the Second Circuit reversed the District Court's order, holding that Atlas Turner had waived its defense of lack of personal jurisdiction. 44a.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Second Circuit departed from the accepted and usual course of judicial proceedings by articulating one standard of review but blatantly ignoring that standard and applying another. The standard it actually chose to apply conflicts with that of other courts of appeals. Additionally, its decision interferes with the power of the district courts to control the litigation pending before them. The decision also interferes with the proceedings in the transferee court, the United States District Court for the Eastern District of Pennsylvania, which for nine years has

been successfully managing and settling thousands of asbestos personal injury actions which were transferred to that court by the Judicial Panel on Multidistrict Litigation. Accordingly, Atlas Turner respectfully submits that this Court should exercise its discretionary and supervisory power by granting the Writ.

I.
THE COURT OF APPEALS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY APPLYING A DE NOVO STANDARD OF REVIEW RATHER THAN THE ABUSE OF DISCRETION STANDARD IT ARTICULATED IN ITS OPINION AND BY IGNORING LEGAL PRECEDENT FROM THIS COURT AND FROM THE SECOND CIRCUIT ITSELF

In its November 22, 1999 opinion, the Court of Appeals stated that "[t]he District Court's ruling that Atlas [Turner] did not waive personal jurisdiction is reviewed for abuse of discretion." 46a. In concluding that Atlas Turner's waiver "was so clear that the District Judge exceeded his allowable discretion in ruling that forfeiture had not occurred, [the Court of Appeals] consider[ed] all of the relevant circumstances." 47a.

Rather than address the District Court's basis for finding no waiver of the personal jurisdiction defense, the Court of Appeals simply rendered its own interpretation of selected facts, thus applying a *de novo* standard of review and merely substituting its conclusion for that of the District Court. In granting Atlas Turner's motion to dismiss, the District Court noted that though Atlas Turner did delay in contesting personal jurisdiction, the delay was not substantial enough to warrant finding a waiver, given the procedural history of the matter, including the three years that the matter was "in limbo" before Judge Weiner of the Eastern District of Pennsylvania as part of the coordinated and consolidated proceedings under MDL No. 875. 28a. Noting that Atlas Turner had raised the defense in its Answer and in its first significant motion, the District Court found that Atlas Turner had not

waived the defense. 28a. The Court of Appeals did not address the District Court's findings, findings which obviously take into account how asbestos personal injury actions are managed through streamlined pre-trial procedures such as standard discovery which plaintiffs must answer as well as Judge Weiner's management of the MDL No. 875 proceedings which focus primarily on effectuating settlements. Instead, the Court of Appeals simply concluded that considerable pre-trial activity occurred in this case including merits discovery and settlement conferences. 48a.

The Court of Appeals found that Atlas Turner waived its defense of personal jurisdiction because it failed to raise the defense when it had four opportunities to do so. 48a. This entire approach by the Court of Appeals ignores its own precedent which dictates that to preserve the defense a litigant must raise the defense "at the time he makes his first significant defensive move. . ." *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 162 F.3d 724, 730 (2d Cir. 1998), quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1391 (1990). It also ignores the finding of the District Court that Atlas Turner had raised the defense in its Answer and in its first significant motion, and thus had not waived the defense. 28a.

Of the four opportunities of which Atlas Turner reportedly failed to take advantage, the Court of Appeals first notes that Atlas Turner could have filed a motion to dismiss prior to the action being transferred to the Eastern District of Pennsylvania which would have precipitated discovery on the jurisdictional issue. 48a. This conclusion by the Court of Appeals places on Atlas Turner the onus born by plaintiff under well established principles of law that plaintiff has the burden of proving the jurisdiction of the District Court over Atlas Turner and the responsibility to conduct discovery to meet its burden of proof. *Compare Insurance Corporation of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee,* 456 U.S. 694, 709 (1982) (affirming use of sanction — of taking as established jurisdictional facts — where defendant refused to obey court's discovery orders relating to jurisdictional issue, thus preventing plaintiff from meeting its burden of proof); *Marine Mid-*

land Bank, N.A. v. Miller, 664 F.2d 899 (2d Cir. 1981). This conclusion also simply ignores the District Court's finding that plaintiff failed to conduct discovery on this issue. 22a.

The Court of Appeals also noted that Atlas Turner failed to object on jurisdictional grounds to including this case in MDL No. 875 and instead joined with other defendants in asking the Judicial Panel on Multidistrict Litigation to effect the transfer to the Eastern District of Pennsylvania. 48a. There is *no evidence* that Atlas Turner joined in seeking transfer. The Second Circuit's opinion merely echoes an assertion from plaintiff's brief, an assertion which had no support in the record because it was not true. Furthermore, the Court of Appeals disregarded its own precedent that "transfers under 28 U.S.C. § 1407, the multidistrict litigation statute, 'are simply not encumbered by considerations of in personam jurisdiction and venue.' " *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1435 (2d Cir. 1996).

Third, the Court of Appeals noted that Atlas Turner could have raised, but failed to raise, its jurisdictional challenge during the three years that this action was before Judge Wiener of the Eastern District of Pennsylvania as part of MDL No. 875. 48a- 49a. As noted above, during the time that this action was pending before the Honorable Charles R. Weiner of the Eastern District of Pennsylvania, Atlas Turner propounded no discovery. In December 1995, plaintiff filed an Amended Complaint and served supplemental discovery responses, amending plaintiff's earlier responses to standard discovery. At no time while this action was pending before Judge Weiner did Atlas Turner file any motions. In fact, Judge Wiener's orders relating to remand of this action reference no substantive discovery but do reference the several settlement conferences held while this action was pending before him. 52a- 54a. Furthermore, the District Court found that the delay was not substantial enough to warrant finding a waiver, given the procedural history of the matter, including the three years that the matter was "in limbo" before Judge Weiner of the Eastern District of Pennsylvania as part of the coordinated and consolidated proceedings under MDL No. 875. 28a. As a forum to which asbestos cases are remanded from MDL No.

875, the District Court was in a far better position to assess the conduct of the parties prior to remand. However, the Court of Appeals simply disregarded the District Court's assessment.

Finally, the Court of Appeals noted that Atlas Turner did not file its motion to dismiss for lack of personal jurisdiction until August 1998, some seven months after the case was remanded to the Southern District of New York, and after the District Court's order consolidating this case with others for trial and initially setting a trial date for mid-June 1998. 49a-50a. The Court of Appeals ignores the fact that the trial of this matter was postponed until September 23, 1998 and that the District Court made no ruling that Atlas Turner's pre-trial motion to dismiss was untimely.

The Court of Appeals purported to apply an abuse of discretion standard in reviewing the District Court's determination that Atlas Turner had not waived its jurisdictional defense. 46a. Nowhere in its opinion does the Court of Appeals explain how or why the District Court abused its discretion. As noted by this Court, "a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corporation,* 496 U.S. 384, 405 (1990). *See also Transaero, Inc. v. La Fuerza Aerea Boliviana, supra*, 162 F.3d at 729 (2d Cir. 1998). The Court of Appeals did not find that the District Court based its ruling on an erroneous view of the law or clearly erroneous assessment of the evidence. Rather, the Court of Appeals simply "substituted its own judgment for that of the District Court," an approach which fails to give to the District Court the substantial deference required by the standard. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 (1981). *See also In re Bolar Pharmaceutical Co., Inc. Securities Litigation,* 966 F.2d 731, 732 (2d Cir. 1992) (" 'Abuse of discretion' is one of the most deferential standards of review; it recognizes that the district court, which is intimately familiar with the nuances of the case, is in a far better position to make certain decisions than is an appellate court, which must work from a cold record.")

What the Court of Appeals did was apply a *de novo* standard of review, in blatant disregard of the standard it pur-

ported to adopt. This is such a departure from the normal course of judicial proceedings that it should not be countenanced by this Court. The Court of Appeals engaged in a result-oriented analysis that ignored this Court's and its own precedent, ignored pertinent portions of the record and simply parroted plaintiff's assertion not supported by record. The Court of Appeals was obviously bound and determined to find a waiver of the defense because a jury trial had been conducted prior to the District Court's ultimate decision that Atlas Turner had not waived its defense. In reaching for its pre-ordained conclusion, the Court of Appeals has substantially interfered with the power of the district courts to manage litigation before them. Such conduct departs from the accepted and usual course of judicial proceedings, calling for an exercise of this Court's supervisory powers pursuant to Rule 10(a) of this Court.

II.
THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SAME ISSUE

The *de novo* standard of review applied by the Court of Appeals in this matter conflicts with decisions of the United States Courts of Appeals for the Federal Circuit and Seventh Circuit. *United States v. Ziegler Bolt and Parts Co.,* 111 F.3d 878,882 (1997) (the decision on waiver is "within the discretion of the trial court, consistent with its broad duties in managing the conduct of cases pending before it"); *Trustees of Central Laborers' Welfare Fund v. Lowery,* 924 F.2d 731, 733 (7th Cir. 1991) (affirming trial court's finding of waiver where the "record amply supports" that finding); *Continental Bank, N.A. v. Meyer,* 10 F.3d 1293, 1297 (7th Cir. 1993) ("The district court could properly conclude that the defendants' delay in urging this threshold issue manifests an intent to submit to the court's jurisdiction"). Accordingly, Atlas Turner respectfully submits that this Court should grant the Writ, pursuant to Rule 10(a) of this Court.

III.
WAIVER OF THE DEFENSE IS AN IMPORTANT ISSUE IN LIGHT OF THE THOUSANDS OF ASBESTOS PERSONAL INJURY ACTIONS STILL PENDING IN FEDERAL COURT

Sixty years ago this Court noted that a party may waive a personal privilege, such as venue, "by failing to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). The passage of time, however, has not diminished the importance of the issue of waiver of defenses.

For this Court, the continuing importance of this issue concerns how the waiver issue reflects on the inherent power of the district courts to manage and control the litigation pending before them. In *United States v. Ziegler Bolt and Parts Co., supra*, 111 F.3d at 882, the Court of Appeals for the Federal Circuit explained why it applied an abuse of discretion standard in reviewing and affirming the lower court's finding that defendant had not waived its jurisdictional defense:

> [T]he trial court recognized the possibility of waiver and analyzed the facts to discern whether waiver had occurred. While this court reviews the *prima facie* existence of personal jurisdiction *de novo*, it applies a different standard for review of an alleged waiver. This court places waiver within the discretion of the trial court, consistent with its broad duties in managing the conduct of cases pending before it.

In support of its rationale, the Federal Circuit cited *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) wherein this Court discussed the necessary, inherent powers which are "vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 43. Atlas Turner submits that the decision concerning waiver of the defense of lack of personal jurisdiction based on conduct during the litigation of a case is properly a matter of the district court's discretion, for the reasons noted by the Federal Circuit in *Ziegler*

Bolt, supra. Additionally district courts are "better positioned" than appellate courts to decide this issue which involves a plethora of unique factors and circumstances that are "little susceptible. . . of useful generalization." *Koon v. United States,* 518 U.S. 81, 99 (1996) citing *inter alia Cooter and Gell v. Hartmarx Corp.,* 496 U.S. 384 (1990). In the present matter, the Court of Appeals showed no deference to the District Court's findings. It simply interjected itself into and imposed its view on a process best left to the District Court, even after the District Court gave plaintiff three opportunities to prove the District Court's jurisdiction over Atlas Turner.

Adding to the general importance of this issue is the fact that the Court of Appeals' decision will have adverse consequences in the federal courts far beyond the jurisdiction of the Second Circuit, due to its independent assessment of the conduct of the litigation while this matter was pending before Judge Wiener of the Eastern District of Pennsylvania. As a result of the Court of Appeals' conclusions, defendants will have to file numerous individualized motions and conduct discovery, thereby increasing transaction costs, much earlier than is currently done in the cases that become part of the MDL No. 875 proceedings before Judge Wiener. Such activity will detract from the resources of the Court and the parties which for nine years have successfully been focused on reducing litigation costs and effectuating settlements. *See In re Asbestos Products Liability Litigation (No. VI),* 771 F.Supp. 415, 424 (J.P.M.L. 1991); *In re Asbestos Products Liability Litigation (No. VI),* 1999 U.S. Dist. LEXIS 12131 at 3 (J.P.M.L. July 27, 1999) ("Under Judge Weiner's stewardship, as of July 27, 1999, . . . nearly 60,000 actions have been closed in the transferee district and. . . nearly 1000 actions or claims therein have been returned to their originating transferor districts."); *In re Joann Patenaude,* 2000 U.S. App. LEXIS 6633 (3d Cir. April 11, 2000) (denying plaintiffs' petition for writ of mandamus to the Judicial Panel on Multidistrict Litigation to remand their cases and noting success of MDL No. 875 proceedings and settlement of cases); *In re Asbestos Products Liability Litigation (No. VI),* 1996 U.S. Dist. LEXIS 13850 (E.D. Pa. September

16, 1996) (denying plaintiffs' motion for suggestion of remand; noting the transferee court's priorities in reducing transaction costs, discovery costs and fees while encouraging settlements).

The federal courts' success in dealing with the asbestos personal injury actions is clearly the result of the emphasis on settlement negotiations, reduction of costs and prioritized remand of cases involving the most seriously ill plaintiffs. That system works because the parties conduct themselves in conformance with the priorities established by Judge Wiener for the MDL NO. 875 proceedings. That system — certainly understood by the Southern District of New York as one of the many transferor courts — should not be side-tracked or derailed by a plethora of individualized motions, as required by the Court of Appeals for the Second Circuit in this matter. Atlas Turner respectfully submits that the magnitude of this litigation warrants the exercise of this Court's discretionary, supervisory power by granting the Writ.

CONCLUSION

For these reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX

*1998 U.S. Dist. LEXIS 14884, *; CCH Prod. Liab. Rep. P15,412*

LINDA **HAMILTON,** individually and as Executrix of the Estate of GEORGE **HAMILTON,**
Plaintiff, - against - A C AND S, INC., et al., Defendants.

94 Civ. 4397 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 14884; CCH Prod. Liab. Rep. P15,412

September 22, 1998, Decided
September 23, 1998, Filed

DISPOSITION: [*1] Atlas's motion to dismiss for lack of personal jurisdiction and for summary judgment denied.

CORE TERMS: asbestos, ship, summary judgment, transferred, personal jurisdiction, exposed, exposure, boiler room, identification, manufactured, deposition, insulation, waived, lack of personal jurisdiction, dry dock, asbestos-containing, discovery, circumstantial evidence, motion to dismiss, exposed to asbestos, doing business, recollection, manufacturer, boilerman, cement, asbestos product, issue of fact, interrogatories, shipyards, sur-reply

COUNSEL: MOSHE MAIMON, ESQ., Of Counsel, LEVY PHILLIPS & KONIGSBERG, New York, NY, for Plaintiff.

SUZANNE M. HALBARDIER, ESQ., Of Counsel, BARRY, McTIERNAN & MOORE, New York, NY, for Atlas Turner Inc., Defendant.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINION BY: ROBERT W. SWEET

OPINION: OPINION

Sweet, D.J.

Atlas Turner Inc. ("Atlas"), defendant in this asbestos litigation, has moved for an order dismissing this action for lack of

personal jurisdiction pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and, alternatively, for summary judgment pursuant to Rule 56. For the reasons set forth below, the motion is denied.

Parties

Plaintiff Linda Hamilton ("Plaintiff") was married to George Hamilton ("Hamilton"). During his lifetime, Hamilton worked as a boilerman in the United States Navy.

Atlas was at all relevant times to this action a Canadian Corporation. It has never been authorized to conduct business in the state of New York.

Prior Proceedings

Hamilton's asbestos claim, naming several defendants including Atlas, was filed in federal court on June 15, [*2] 1994. An amended complaint was filed on December 14, 1995. This action is one of many that has been supervised by the Multidistrict Litigation Panel ("MDL") for discovery and pretrial purposes. It was originally filed in the Southern District of New York and subsequently transferred by order of the MDL to the Honorable Charles R. Weiner of the Eastern District of Pennsylvania. The action was transferred back to this Court on December 13, 1997, and thereafter consolidated with four other asbestos cases for trial. Trial has been scheduled for September 23, 1998.

The instant motion was filed on August 3, 1998. All additional papers were filed by September 17, 1998, at which time the motion was deemed fully submitted.[1]

Facts

Hamilton was diagnosed with a pleural effusion in January of 1992, and with mesothelioma in January of 1993. He died from the [*3] cancer on November 4, 1994, at the age of 54. He is survived by his widow, Linda, and eight children, ages 32 to 4.

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1. Plaintiff's sur-reply will not be rejected as Atlas has requested. Indeed, Atlas has responded to it, and its response has been considered as well.

According to Hamilton, he was exposed to asbestos when he served as a boilerman in the United States Navy from 1959 to 1961. He was stationed at the Norfolk Virginia Shipyard and served in the boiler room of the *U.S.S. John W. Weeks* (the "*Weeks*"). His exposure includes the period in which the ship was in dry dock in the Portsmouth Naval Shipyard for one month sometime between the end of 1960 and the beginning of 1961. Hamilton gave testimony at a discovery deposition on June 28, 1994 ("Deposition"), and a videotaped deposition on June 29, 1994 ("Video Deposition"). At both depositions, when asked about the asbestos products used aboard the *Weeks*, Hamilton named "Atlas" as one of the manufacturers of those asbestos products to which he claims exposure. Additionally, another boilerman who served on the *Weeks* from 1958 to approximately 1962 recalls the use of Atlas asbestos products on the ship.

Discussion

I. Atlas's Motion to Dismiss for Lack of Personal Jurisdiction Is Denied

Atlas moves to dismiss this action, contending that this [*4] Court lacks personal jurisdiction over it. Atlas asserts that it is a Canadian corporation, that the injury at issue took place in Norfolk, Virginia, and that the only link to New York is Hamilton's residence. Atlas thus suggests that this matter be transferred to Virginia.

In considering a 12(b)(2) motion to dismiss for lack of personal jurisdiction, a district court must construe the facts from the pleadings and affidavits in the light most favorable to the plaintiff. See *Hoffritz for Cutlery, Inc. v. Amajac,* 763 F.2d 55, 57 (2d Cir. 1985); *Cosmetech Int'l, LLC v. Der Kwei Enter. and Co., LTD,* 943 F. Supp. 311, 314 (S.D. N.Y. 1996). Since this action is one based on diversity of citizenship, the law of New York will dictate whether this Court may exercise personal jurisdiction over Atlas. See *Hoffritz,* 763 F.2d at 57; see also *Crouch v. Atlas Van Lines, Inc.,* 834 F. Supp. 596, 599 (N.D.N.Y. 1993). Accordingly, assessment of whether New York's Civil Practice Law and Rules ("CPLR") provides for

jurisdiction must be made. See N.Y. C.P.L.R. §§ 301, 302 (McKinney 1990). However, in the instant case, Plaintiff proposes that Atlas has waived its right to object to personal [*5] jurisdiction.

Lack of personal jurisdiction is a "privileged defense that can be waived 'by failure [to] assert [it] seasonably, by formal submission in a cause, or by submission through conduct.' " *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 480 (S.D.N.Y. 1985) (quoting *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 168, 84 L. Ed. 167, 60 S. Ct. 153 (1939)); cf. *Santos*, 902 F.2d 1092, 1095 (advising that under Rule 12(h)(1), if the defense of insufficiency of process is not promptly asserted by motion or in the responsive pleading, it is waived). Although Rule 12(h)(1) does not set forth the period of time in which a party may contest personal jurisdiction, other than the 20-day period for filing a responsive pleading, the defense must be made in a reasonably timely manner or it is waived. See *Burton*, 106 F.R.D. at 481; See, e.g., *Marcial Ucin, S.A. v. S.S. Galicia*, 723 F.2d 994, 997 (1st Cir. 1983).

Atlas has literally complied with Rule 12(h)(1) by asserting the defense of lack of jurisdiction in its answer. However, even if a litigant preserves the defense by including it in his answer, undue delay in challenging personal jurisdiction by a motion to dismiss may constitute a waiver. [*6] See *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1303 (2d Cir. 1990); *Burton* 106 F.R.D. at 481; *Vozeh v. Good Samaritan Hosp.*, 84 F.R.D. 143, 144 (S.D.N.Y. 1979). The responsive pleadings do not preserve the defense in perpetuity. Indeed, when unwarranted delay in contesting jurisdiction produces a prejudice on the plaintiff, courts are more apt to find that the defendant has waived his or her right to assert the defense. See, e.g., *Burton*, 106 F.R.D. at 481; *Vozeh*, 84 F.R.D. at 144.

In the instant case, Plaintiff has made a meaningful argument for waiver. First, Plaintiff alleges that if this case is transferred to Virginia, she will have suffered extreme prejudice because the statute of limitations in Virginia has passed. Second, Plaintiff urges that Atlas's failure to object when the MDL court transferred this case back to the Southern District of New

York in December 1997 is a waiver of jurisdiction. Plaintiff notes that the United States District Court for the Eastern District of Pennsylvania, the MDL court to which the asbestos matters were transferred for pretrial proceedings, issued a Show Cause Order on November 7, 1997, requiring the parties here to [*7] "SHOW CAUSE, if there be any [sic], why these actions should or should not be transferred immediately back to the transferor jurisdiction for trial and other necessary action." The transfer was effectuated without any objection by Atlas. On December 17, 1997, the action was transferred back to this district. In the transfer order, the Southern District of New York was stated to be "a district wherein [this] action may have originally been brought . . . ." Plaintiff further relies on Multidistrict Litigation Rule 14, which states that "failure of a party to respond to a show cause order regarding remand shall be treated as that party's acquiescence to the remand." Although this Rule does not act as a "waiver" of the defense of personal jurisdiction, other facts support Plaintiff's position.

Plaintiff represents that Atlas waited over four years after this action was filed and after Hamilton's deposition to raise the issue on the eve of trial. In the meantime, according to Plaintiff, Atlas has participated in this action by attending all conferences and participating in pretrial discovery, all while remaining silent on the jurisdictional issue. Such delay, Plaintiff states, constitutes [*8] waiver on Atlas's behalf. By contrast, Atlas suggests that the motion is not untimely, as the case was in limbo in the Eastern District of Pennsylvania, and that this motion has been made within sufficient time after remand to this Court.

Yet the case was transferred in December 1997, and Atlas did not take action at that time or soon thereafter. Indeed on April 1, 1998, during oral arguments on plaintiffs' motion to consolidate various actions, including this one, for trial, the Court set a preliminary trial date for mid-June 1998. The instant motion was not filed until August 1998. The alleged prejudice to Plaintiff and Atlas's delay support a denial of its motion.

Additionally, in briefing the lack of personal jurisdiction issue, neither party addressed whether Atlas was "doing business" in New York in 1994, the time that the action was filed.

CPLR § 301 tersely states that a New York court "may exercise jurisdiction over persons, property, or status as might have been exercised heretofore." The statute incorporates all grounds of jurisdiction previously recognized at common law. See *Penny v. United Fruit Co.*, 869 F. Supp. 122, 125 (E.D.N.Y. 1994). Pursuant to § 301, a [*9] foreign corporation will be subject to personal jurisdiction in New York if it is present or is "doing business" in the state. A corporation's activity rise to the level of "doing business" only when it is engaged in "such a continuous and systematic course of activity that it can be deemed present in the state of New York." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50-51 (2d Cir. 1991) (quoting *Laufer v. Ostrow*, 55 N.Y.2d 305, 434 N.E.2d 692, 694, 449 N.Y.S.2d 456, 458 (1982) (citations omitted)); see *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990); *Frummer v. Hilton Hotels Int'l, Inc.*, 19 N.Y.2d 533, 536, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 43 (1967). Under § 301 of the CPLR, a corporation's presence in New York is determined based on the time the lawsuit is filed, not when the claim arose. *Penny*, 869 F. Supp. at 125.

The evidence presented by plaintiff suggests that Atlas was doing business in New York from the 1950s to the 1970s, but no information has been proffered regarding 1994, the relevant time under the law. It would appear that discovery is incomplete in this area.

In light of the foregoing reasons, Atlas's motion to dismiss based on [*10] lack of personal jurisdiction will be denied at this time. However, the motion may be renewed upon a fuller record.

II. Standard for Summary Judgment

Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). In deciding

a motion for summary judgment, the court is not expected to resolve disputed issues of fact, *Donahue v. Windsor Locks Board of Fire Commissioners,* 834 F.2d 54, 57 (2d Cir. 1987), but to determine whether there are any factual issues which require a trial. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). The court must view the evidence in the light most favorable to the non-moving party. *O'Brien v. National Gypsum Co.,* 944 F.2d 69, 72 (2d Cir. 1991). However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." 475 U.S. at 586.

III. There Exists an Issue of Material Fact as to Whether Hamilton Was Exposed to an Atlas Product Containing Asbestos

Atlas contends that Plaintiff cannot establish that Hamilton was exposed to [*11] asbestos fibers released from any product manufactured and sold by Atlas, asserting that Hamilton's recollection of the name "Atlas" could be an identification of one of the two Atlas companies approved for use in the United States Government shipyards or one of the various Atlas companies located in the United States. After all, claims Atlas, it never sold asbestos cement in the United States. According to Atlas, because the evidence on the issue of product identification adduced in discovery is insufficient to create a genuine issue of material fact, it is entitled to summary judgment as a matter of law.

To succeed on the claim here, plaintiff has the burden of proving that Hamilton was exposed to Atlas's products, and that it is more likely than not that this exposure was a substantial factor in Hamilton's injury. See *Johnson v. Celotex Corp.,* 899 F.2d 1281, 1285-86 (2d Cir. 1990); *Greger v. Owens-Corning Corp.,* 963 F.Supp. 314, 316-17 (S.D.N.Y. 1997); *In re Joint Eastern and Southern Districts Asbestos Litigation,* 1993 U.S. Dist. LEXIS 3963, 92 Civ. 1113, 1993 WL 97301, at *1 (S.D.N.Y. Mar. 30, 1993) [hereinafter *Clarkson*]. In order to establish proximate causation by Atlas's asbestos [*12] prod-

uct, Plaintiff must produce evidence identifying that product as a factor in Hamilton's injury. See *Johnson,* 899 F.2d at 1286; *Hymowitz v. Eli Lilly & Co.,* 73 N.Y.2d 487, 507, 541 N.Y.S.2d 941, 539 N.E.2d 1069 (1988); *Clarkson,* 1993 U.S. Dist. LEXIS 3963, 1993 WL 97301, at *1. Plaintiff need not make a precise identification of exposure to a particular product, however. Circumstantial evidence may be sufficient to meet this burden. See *O'Brien*, 944 F.2d at 72 (citing *Prunier v. City of Watertown*, 936 F.2d 677 (2d Cir. 1991)); *Johnson*, 899 F.2d at 1286-87 (circumstantial evidence sufficient to uphold jury verdict).

The Second Circuit has allowed circumstantial evidence of product identification at least four times, and "each time, we found proof of causation sufficient notwithstanding the lack of identification of the precise product that injured a given plaintiff." *Kreppein v. Celotex Corp.,* 969 F.2d 1424, 1426 (2d Cir. 1992) (referring to *In re Brooklyn Navy Yard Asbestos Litig.,* 971 F.2d 831, 836-37 (2d Cir. 1992); *O'Brien,* 944 F.2d at 72-73; *Johnson,* 899 F.2d at 1285-87). Still, the plaintiff must show some circumstantial evidence that he was at the approximate [*13] place and approximate time during which the defendant's product was used. See *Clarkson,* 1993 U.S. Dist. LEXIS 3963, 1993 WL 97301, at *2; see also *Comeau v. W.R. Grace & Co.,* 216 A.D.2d 79, 80, 628 N.Y.S.2d 72, 73 (1st Dep't 1995) (stating that "plaintiffs must allege facts and conditions from which the defendant's liability may be reasonably inferred, that is, that plaintiff worked in the vicinity where defendant's products were used, and that plaintiff was exposed to defendant's product").

Hamilton's deposition testimony confirms that he was able to recall asbestos-containing products of manufactures that were brought on board the *Weeks* during the one month that the ship was in dry dock at the Portsmouth Naval Shipyard at some time between the end of 1960 and the beginning of 1961. With respect to the ship's one month in dry dock, Hamilton recalled the names of four manufacturers of asbestos products to which he believed he was exposed; Atlas was among them.

Atlas surmises that Hamilton's recollection of the name "Atlas" is insufficient to link the name with its company.

Atlas maintains that it did not make or sell asbestos cement in the United States. It relies on the testimony of Andrew Richardson [*14] ("Richardson"), who was employed by Atlas from February 1967 to December 31, 1983, and responsible for the sales of insulation products in the United States. However, Richardson began his employment with Atlas five-and-a-half years after Hamilton was last exposed to asbestos on the *Weeks*. Additionally, according to Hamilton, while "Atlas Turner" did not sell products into the United States, "Atlas Asbestos Company" did. As stated in its answer to Hamilton's interrogatories, "on December 21, 1976, Atlas Asbestos Co., Ltd. was incorporated under the Canada Business Corporations Act and on March 5, 1977 acquired the assets of Atlas Asbestos Co., Manufacturing Division of Bell Asbestos Mines, Ltd. On March 1, 1979 Atlas Asbestos Co., Ltd. changed its name to Atlas-Turner, Inc."

In support for its proposition, Atlas has submitted qualified product lists for the United States Government ("QPL"), which identify two companies approved for use in military shipyards for insulation products with the name "Atlas" in their titles: "Atlas Adhesives Div." of the Flintkote Co. and "Atlas Chemical Co.," whose product was designated as "Atlas-Bond Lagging Adhesive No. 316. Atlas contends that both [*15] submitted their insulation products for testing and were approved for use by the United States Government. Atlas points out that it is not identified on the QPL. Yet Atlas's reliance on the QPL to support that "some other Atlas did it" fails to persuade. First, as Hamilton notes, the military specifications that preceded the submission of products for consideration for the QPLs indicate that QPLs are not exclusive. Second, the QPL that Atlas provides that it claims identifies products made by "Atlas Adhesives Div." and "Atlas Chemical Co." identifies adhesive products and not the asbestos-containing products that Hamilton identified on the *Weeks*.

Regarding sales to the United States, Atlas concludes that plaintiff has offered no proof demonstrating sales of its products. However, Plaintiff complains that this is because Atlas has refused to answer relevant questions in Plaintiff's standard liability and site-specified product identification interrogatories, and has failed to turn over any sales records. Atlas counters that it responded over eight years ago and that it did not sell asbestos products to the Norfolk Naval Shipyard or the *Weeks* from 1958 to 1961. Any purported [*16] discovery abuse is not presently before the Court.

Atlas also seeks to insulate itself from liability by proclaiming that, as a Canadian corporation, it could not sell to federal shipyards because of the "Buy American Act." However, Plaintiff maintains that Hamilton was exposed to Atlas's asbestos-containing products. This presents an issue of fact that cannot be resolved at present. Indeed, various courts have noted that Atlas engaged in distribution schemes to ship asbestos-containing products into the United States. See, e.g., *In re Connecticut Asbestos Litig.*, 677 F. Supp. 70, 71-76 (D. Conn. 1986); *Carre v. AC and S, Inc.*, 1986 U.S. Dist. LEXIS 15965, Civ. A. Nos. 85-1737, 85-2472, 1986 WL 537, at *1 (E.D. Pa. Dec. 29, 1986); *McDaniel v. Armstrong Indus.*, 603 F. Supp. 1337, 1339-40 (D.D.C. 1985). Additionally, this Court refused to set aside a jury verdict finding Atlas liable for the plaintiffs exposure to Atlas's asbestos products in New York and New Jersey. See *In re New York Asbestos Litig.*, 847 F. Supp. 1086, 1102 (S.D.N.Y. 1994), aff'd in part and rev'd in part on other grounds sub nom. *Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003 (2d Cir. 1995). Atlas's assertions that [*17] it did not sell asbestos to the United States or the United States Navy are insufficient to deny Plaintiff her day in court.

Atlas continues that there are other American companies that sold insulation products under the name "Atlas" and therefore the mere recollection of the word "Atlas" is insufficient to establish exposure to an Atlas Turner product. Plaintiff represents that accepting Atlas's contention would lead to the following result: A defendant markets a deadly product for use by workers in the field, and clearly labels that product with

only a portion of its company's name, a portion also used by certain other companies that market different products. Because it would be difficult for an ordinary worker to be precisely aware of the entire unmarked portion of the company name, the defendant conveniently insulates itself from liability.

Indeed, in this case, Plaintiff has provided Atlas's sworn Answers to Interrogatories — albeit, in the District of South Carolina litigation — establishing that Atlas manufactured the type of asbestos products to which Hamilton referred. In his depositions, Hamilton identified four types of asbestos products that he was exposed to: asbestos [*18] pipe covering, asbestos (boiler) blocks, asbestos cement, and asbestos gaskets. The Answers indicate that Atlas Asbestos manufactured and sold three out of the four. It manufactured the pipe covering, blocks, and cement, but not the asbestos gaskets. Given Plaintiff's allegations and the submission of testimony set forth below, Atlas does not succeed in its assertion that the product Hamilton saw and was exposed to was not an asbestos product for which Atlas may be liable or that Plaintiff has failed to raise an inference as to whether the product was one of Atlas's See *Hamilton v. AC and S, Inc.,* 1998 U.S. Dist. LEXIS 14440, 94 Civ. 4397 (S.D.N.Y. Sept. 14, 1998) (rejecting defendant Kaiser Aluminum's contention that the name "Kaiser" by itself on a product identified by plaintiff is insufficient to surmount summary judgment).

Hamilton's Deposition contains the following colloquy:

> Q: Do you have any reason to believe that you were exposed to asbestos while you were working in the boiler room of the USS John Weeks?
>
> A: Yes.
>
> . . .
>
> Q: Were you able to tell who manufactured the various asbestos that was being used in the boiler room area [on the *Weeks*]?

A: Well, when we went into [*19] dry docks in Portsmouth you had an opportunity to see some of the products that went into the boiler room.

Q: Was this for repair or was this an initial installation?

A: Yes. Complete the dry dock operation where you took everything out of the ship and put everything new into it, put everything brand new into the ship again.

. . .

Q: Were you involved in any of the asbestos removal or equipment removal?

A: My job was as a fireman to take the garbage out, put it in the dumpsters on the pier.

Q: So, to some degree, you were involved in this operation?

A: Yes.

. . .

Q: I believe you said that you saw some replacement equipment when you were in dry dock?

A: Yes.

Q: Some of that asbestos?

A: Yes.

Q: Was that asbestos taken from shore and installed in the ships?

A: Yes.

Q: In the boiler room?

A: Yes.

Q: Do you recall any of the manufacturers of those asbestos products?

A: Yes.

Q: Would you give me the names, please?

A: There was a company Owens-Corning, Kaiser, Anchor and Atlas.

. . .

Q: The four that you mentioned, do you recall specifically where each particular asbestos product was placed within [*20] the ship or the boiler room?

A: I have ideas from working there.

. . .

Q: How about Atlas, do you recall what specific type of product it was they manufactured?

A: I just recall the name familiar to me.

(Hamilton Dep. Tr. at 44-52.)

Hamilton's Video Deposition confirms his account, this time linking Atlas to insulation products:

Q: Do you recall the manufacturer names of any of the insulation products that were used onboard ship during the period that you were on the USS John Weeks?

A: I recall some of them.

Q: What names to you remember?

A: The ones that I remember are Atlas, Owens-Corning, Kaiser and then Anchor.

(Hamilton Video Dep. Tr. at 26.)

A litigant's deposition testimony is sufficient to raise an issue of fact precluding summary judgment. See *Dollas*, 225 A.D.2d 319, 321, 639 N.Y.S.2d 323 324-25. "Any conflict between plaintiff's allegations and the documentary evidence merely presents an issue of credibility for resolution at trial." Id. at 321, 639 N.Y.S.2d at 325. The assessment of the value of Hamilton's testimony constitutes an issue for resolution by the trier of fact. Such resolution at present would be an [*21] impermissible determination of that issue that must await trial. See *Millerman v. Georgia Pac. Corp.*, 214 A.D.2d 362, 363. 625

N.Y.S.2d 29, 30 (1st Dep't 1995) (in denying summary judgment, finding that the plaintiff had submitted adequate proof that the defendant's predecessor was likely to have furnished the asbestos products that were among those to which the plaintiff was exposed).

Furthermore, Plaintiff, in her sur-reply, offers the recollection of Cliff Mann ("Mann"), who served as a boilerman in the United States Navy aboard the *Weeks* from 1958 to approximately 1962, overlapping with Hamilton. According to Plaintiff, Mann recalls that the products of Atlas Asbestos – the company whose assets Atlas acquired – were used on the *Weeks* and at the Norfolk Naval Shipyard during his time there. Because this late-breaking development corroborates the testimony of Hamilton and pertains to a central fact in this case, its consideration in this motion supports the denial of summary judgment. However, this "new" evidence was adduced by Plaintiff on the eve of trial – specifically, September 16, 1998. As such, Atlas is entitled to depose Mann to evaluate his credibility. Although [*22] Atlas's request, in its reply to Plaintiff's sur-reply, for an adjournment of trial is denied, if Atlas is unable to complete discovery of this witness prior to the time he is to testify at trial, Mann's testimony will not be permitted.

The role of this Court in deciding the instant motion is not to resolve disputed issue of fact, but to determine whether there are any factual issues which require trial. Drawing all reasonable inferences in favor of Plaintiff, Hamilton's testimony, as well as the purported testimony of Mann, raise an issue of fact as to Hamilton's exposure to an asbestos-containing product of Atlas's. Atlas's motion must therefore be denied.

Conclusion

For the reasons set forth above, Atlas's motion to dismiss for lack of personal jurisdiction and for summary judgment is hereby denied.

It is so ordered.

New York, N. Y.
September 22, 1998

ROBERT W. SWEET

U.S.D.J.

*31 F. Supp. 2d 351, *; 1998 U.S. Dist. LEXIS 20398,***

LINDA **HAMILTON,** Individually and as Executrix of the Estate of GEORGE **HAMILTON,** Plaintiff, - against - GARLOCK, INC., et al., Defendants.

94 Civ. 4397 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

31 F. Supp. 2d 351; 1998 U.S. Dist. LEXIS 20398

December 29, 1998, Decided
January 5, 1999, Filed

DISPOSITION: [**1] Atlas' motion for dismissal on ground of lack of personal jurisdiction granted. Leave to reargue granted.

CORE TERMS: personal jurisdiction, motion to dismiss, lack of personal jurisdiction, tortious act, nondomiciliary, doing business, jurisdictional, situs, asbestos, exposure, commits, exercise personal jurisdiction, exercise jurisdiction, summary judgment, leave to renew, solicitation, resident, fuller, causing injury, consolidated, post-trial, arm, burden of establishing, business transacted, service of process, physical presence, cause of action, set forth, preponderance, purposefully

COUNSEL: For Plaintiff: MOSHE MAIMON, ESQ., CHRIS ROMANELLI, ESQ., Of Counsel, LEVY PHILLIPS & KONIGSBERG, New York, NY.

For Atlas Turner, Inc., Defendant: ROGER P. McTIERNAN, ESQ., Of Counsel, BARRY, McTIERNAN & MOORE, New York, NY.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINION BY: ROBERT W. SWEET

OPINION: [*353] OPINION

Sweet, D.J.

Defendant Atlas Turner Inc. ("Atlas") has brought a trio of post-trial motions in response to a jury verdict entered in

favor of plaintiff Linda Hamilton ("Plaintiff") in an asbestos action. First, Atlas has moved for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or in the alterative for a new trial pursuant to Rule 59(a). Second, Atlas seeks reconsideration of this Court's November 5, 1998 order that set aside the jury verdict regarding the issue of allocation of fault. Finally, Atlas has renewed its motion pursuant to Rule 12(b) for an order dismissing the complaint for lack of personal jurisdiction. For the reasons set forth below, Atlas' motion to dismiss for lack of personal jurisdiction is granted, and thus [**2] the motions for reconsideration and for judgment or a new trial need not be considered.

Parties

Plaintiff was married to George Hamilton ("Hamilton"). During his lifetime, Hamilton worked as a boilerman in the United States Navy.

Atlas was at all relevant times to this action a Canadian Corporation. It has never been authorized to conduct business in the State of New York.

Prior Proceedings and Facts

The prior proceedings and facts in this action have been set forth in a prior opinion of this Court, familiarity with which is assumed. See *Hamilton v. A C and S, Inc.*, 1998 U.S. Dist. LEXIS 14884, No. 94 Civ. 4397, 1998 WL 651049 (S.D.N.Y. Sept. 23, 1998) [hereinafter *Hamilton I*]. Those facts and prior proceedings relevant to the instant motion are set forth below.

Plaintiffs asbestos claim, naming several defendants including Atlas, was filed in federal court on June 15, 1994. An amended complaint was filed on December 14, 1995. This action is one of many that has been supervised by the Multidistrict Litigation Panel ("MDL") for discovery and pretrial purposes. It was originally filed in the Southern District of New York and subsequently transferred by order of the MDL [**3] to the Honorable Charles R. Weiner of the Eastern District of Pennsylvania. The action was transferred back to this Court on

December 13, 1997, and thereafter consolidated by opinion dated May 7, 1998, with four other asbestos cases for trial.

Prior to the commencement of trial, Atlas brought a motion to dismiss for lack of personal jurisdiction, or in the alternative for summary judgment. The motion for summary judgment was denied, and the jurisdictional motion was denied with leave to renew upon a fuller record. See *Hamilton I,* 1998 WL 650149.

The claims in this action were brought by Linda Hamilton, the widow of George Hamilton. Hamilton was diagnosed with a pleural effusion in January of 1992, and with mesothelioma in January of 1993. He died from the cancer on November 4, 1994, at the age of 54. He was survived by his widow, Linda, [*354] and eight children, ages 32 to 4. Testimony established that Hamilton was exposed to asbestos when he served as a boilerman in the United States Navy from 1959 to 1961. He was stationed at the Norfolk Virginia Shipyard and served in the boiler room of the *U.S.S. John W. Weeks* (the *"Weeks"*)

Trial commenced on September 23, 1998. On October [**4] 20, the jury returned a verdict for Plaintiff. Judgment in the amount of $ 4,288,427.47 was entered on November 6, 1998. The instant motions were filed November 23, 1998. Oral arguments were held December 14, 1998, at which time Atlas' post-trial motions were deemed fully submitted.

Discussion

I. The Holding in *Hamilton I*

On August 3, 1998, Atlas filed a motion pursuant to Rule 12(b), dismissing the action against it for lack of personal jurisdiction. Alternatively, it moved for summary judgment. In Hamilton I, the summary judgment motion was denied as was the motion to dismiss for lack of jurisdiction. However, the denial of the jurisdictional motion was not absolute. Rather, it was "denied at this time," with leave to renew upon a fuller record. *Hamilton I,* 1998 WL 651049, at *3.

Equitable concerns prompted the denial of Atlas' motion in September. This Court acknowledged that Plaintiff had made

a "meaningful argument for waiver," id. at *2, and that neither side had provided facts from which it could be ascertained that Atlas was "doing business" in New York at the relevant time. Given the circumstances, including the fact that the instant [**5] case had been consolidated with four other cases for trial and that in the interests of justice the cases had moved together, it seemed prudent to deny Atlas' motion until discovery was complete on the issue and the record supported a meaningful finding that jurisdiction did or did not exist over Atlas.

The trial having been completed and all the evidence having been presented, Atlas' motion to dismiss for lack of personal jurisdiction must now be granted because Plaintiff has failed to meet her burden of establishing that this Court may exercise jurisdiction over Atlas. It is significant that in Hamilton I, Plaintiff was required to make only a prima facie showing that personal jurisdiction existed. See *Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir. 1981); *Roth v. El Al Israel Airlines, Ltd.,* 709 F. Supp. 487, 489 (S.D.N.Y. 1989); see also *Welsh v. Servicemaster Corp.,* 930 F. Supp. 908, 910 (S.D.N.Y. 1996); *Houbigant, Inc. v. ACB Mercantile, Inc.,* 914 F. Supp. 964, 980 (S.D.N.Y. 1995). However, the burden at this juncture is greater. Plaintiff must establish personal jurisdiction by a preponderance of the evidence. See, e.g., *Marine Midland, [**6]* 664 F.2d at 904; *Houbigant,* 914 F. Supp. at 980. She has not done so.

II. This Court Lacks Jurisdiction Over Atlas

In considering a 12(b)(2) motion to dismiss for lack of personal jurisdiction, a district court must construe the facts from the pleadings and affidavits in the light most favorable to the plaintiff. See *Hoffritz for Cutlery, Inc. v. Amajac,* 763 F.2d 55, 57 (2d Cir. 1985); *Cosmetech Int'l, LLC v. Der Kwei Enter. and Co., LTD,* 943 F. Supp. 311, 314 (S.D.N.Y. 1996). Implicit is the understanding that a plaintiff bears the burden of establishing jurisdiction over a defendant; however, until "a full evidentiary hearing or a trial on the merits is held, [a plaintiff] need only set forth prima facie evidence of personal jurisdic-

tion." *Beacon Enters, Inc., v. Menzies,* 715 F.2d 757, 768 (2d Cir.-1983). As a trial has been held in this action, " 'plaintiff must establish jurisdiction by a preponderance of the evidence.' " *Kowalski-Schmidt v. CLS Mortgage, Inc.,* 981 F. Supp. 105, 108 (E.D.N.Y. 1997) (quoting *Marine Midland,* 664 F.2d at 904); see *Roth,* 709 F. Supp. at 489.

Since this action is one based on diversity of citizenship, the [**7] law of New York will dictate whether this Court may exercise personal jurisdiction over Atlas. See *Hoffritz,* 763 F.2d at 57; see also *Crouch v. Atlas Van Lines, Inc.,* 834 F. Supp. 596, 599 (N.D.N.Y. 1993). Accordingly, assessment of whether New York's Civil Practice Law and Rules ("CPLR") provides for jurisdiction must be made. See N.Y. C.P.L.R. §§ 301, 302 [*355] (McKinney 1990). A two-fold inquiry is required. First, a determination must be made as to whether New York law provides a basis for exercising personal jurisdiction over the defendant. If jurisdiction is proper as a result of this analysis, the second inquiry ascends to a constitutional level, which requires an assessment of whether exercising jurisdiction over the defendant would offend due process. See *International Shoe Co. v. Washington,* 326 U.S. 310, 90 L Ed. 95, 66 S. Ct. 154 (1945); see also *Twine v. Levy,* 746 F. Supp. 1202, 1204 (E.D.N.Y. 1990). In light of the determination below that Atlas is not subject to personal jurisdiction under New York law, the due process analysis need not be conducted.

A. "Doing Business" Pursuant to § 301

CPLR § 301 tersely states that a New York court "may [**8] exercise jurisdiction over persons, property, or status as might have been exercised heretofore." The statute incorporates all grounds of jurisdiction previously recognized at common law. See *Penny v. United Fruit Co.,* 869 F. Supp. 122, 125 (E.D.N.Y. 1994). Pursuant to § 301, a foreign corporation will be subject to personal jurisdiction in New York if it is present or is "doing business" in the state. A corporation's activity rise to the level of "doing business" only when it is engaged in "such a continuous and systematic course of activity that it can be

deemed present in the state of New York." *Klinghoffer v. S.N.C. Achille Lauro,* 937 F.2d 44, 50-51 (2d Cir. 1991) (quoting *Laufer v. Ostrow,* 55 N.Y.2d 305, 434 N.E.2d 692, 694, 449 N.Y.S.2d 456, 458 (1982) (citations omitted)); see *Mareno v. Rowe,* 910 F.2d 1043, 1046 (2d Cir. 1990); *Frummer v. Hilton Hotels Int'l, Inc.,* 19 N.Y.2d 533, 536, 227 N.E.2d 851, 853, 281 N.Y.S.2d 41, 43 (1967). Under § 301 of the CPLR, a corporation's presence in New York is determined based on the time the lawsuit is filed, not when the claim arose. *Penny,* 869 F. Supp. at 125.

Indeed, without any physical presence in New York, [**9] a foreign corporation may be subjected to the jurisdiction of New York if the corporation conducts, or purposefully directs, business " 'not occasionally or casually, but with a fair measure of permanence and continuity.' " *Landoil Resources Corp. v. Alexander & Alexander Servs.* 77 N.Y.2d 28, 34, 565 N.E.2d 488, 490, 563 N.Y.S.2d 739, 741 (1990) (quoting *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 267, 115 N.E. 915, 917 (1917)). The test, a "simple pragmatic one," *Bryant v. Finnish Nat'l Airline,* 15 N.Y.2d 426, 432, 208 N.E.2d 439, 441, 260 N.Y.S.2d 625, 629 (1965), is necessarily fact sensitive. See *Landoil Resources Corp. v. Alexander & Alexander Servs.,* 918 F.2d 1039, 1043 (2d Cir. 1990); *Stark Carpet Corp. v. M-Geough Robinson, Inc.,* 481 F. Supp. 499, 504 (S.D.N.Y. 1980) (citing *Manchester Modes, Inc. v. Lilli Ann Corp.,* 306 F. Supp. 622, 624 (S.D.N.Y. 1969)).

"In assessing jurisdiction under this pragmatic standard, New York courts have generally focused on the following indicia of jurisdiction: the existence of an office in New York; the solicitation of business in New York; the presence of bank accounts or other property in New York; and the presence [**10] of employees or agents in New York." *Landoil,* 918 F.2d at 1043; see *Hoffritz,* 763 F.2d at 58. However, "solicitation of business alone will not justify a finding of corporate presence in New York with respect to a foreign manufacturer or purveyor of services." *Laufer v. Ostrow,* 55 N.Y.2d 305, 310, 434 N.E.2d 692, 694, 449 N.Y.S.2d 456, 459 (1982); see *Frummer,* 19 N.Y.2d at 536, 227 N.E.2d at 853, 281 N.Y.S.2d at 43. Yet if the

solicitation "is substantial and continuous, and defendant engages in other activities of substance in the state, then personal jurisdiction may properly be found to exist." *Landoil,* 918 F.2d at 1043-44; see *Beacon,* 715 F.2d at 763; *Aquascutum of London, Inc. v. S.S. American Champion,* 426 F.2d 265, 211 (2d Cir. 1970).

Here, Plaintiff concedes that Atlas has no offices or owns no real estate in New York, that it maintains no bank accounts in this state, and that it is not authorized to conduct business in New York. Moreover, Plaintiff has submitted no proof regarding any business activity of Atlas in 1994 in the State of New York. Furthermore, the only proof adduced at trial regarding Hamilton's exposure establishes that the exposure [**11] was [*356] limited to the Norfolk Virginia Shipyard. Although Plaintiff did offer testimony of two workers who recalled using Atlas products in New York, these witnesses limited their testimony to the 1960's and 1970's. Thus their testimony has no relevance to 1994, the time period at issue.

Plaintiff submits that Atlas has refused to produce documents or answer interrogatories concerning its sales and/or revenues in New York. However, the answers to interrogatories filed by Atlas to which Plaintiff refers are from 1988, six years prior to the filing of this action. Significantly, Plaintiff can point to no discovery request submitted after 1994 that seeks information concerning any sales by Atlas to New York in 1994.

Upon a "fuller record," Plaintiff has not met its burden in establishing that Atlas was "doing business" in New York within the meaning of § 301 in 1994. Accordingly, § 301 does not prove a basis under which this Court may exercise jurisdiction over Atlas.

B. New York State Long Arm Jurisdiction

New York's long arm statute, CPLR § 302, provides in pertinent part:

> (a) As to a cause of action arising from any acts enumerated in this section, a court may [**12] exercise personal

> jurisdiction over any nondomiciliary . . . who in person or through an agent:
>
> 1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
>
> 2. commits a tortious act within the state . . . ; or
>
> 3. commits a tortious act without the state causing injury to person or property within the state . . . if he
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce . . . .

N.Y. C.P.L.R. § 302(a).

The long arm statute thus requires "a strong nexus between the plaintiff's cause of action and the defendant's in state conduct." *Welsh*, 930 F. Supp. at 910; see *McGowan v. Smith*, 52 N.Y.2d 268, 272, 419 N.E.2d 321, 322-23, 437 N.Y.S.2d 643, 645 (1981) (explaining that there must be some "articulable nexus between the business transacted and the [claim]"); see also *Beacon*, 715 F.2d at 762.

Plaintiff has [**13] failed to establish any connection between Atlas' alleged activity in or outside of New York state and Hamilton's injuries. Additionally, as discussed below, Hamilton's injuries did not occur in New York, but in Virginia.

1. Transacting Business

Under CPLR § 302(a)(1), personal jurisdiction exists over a nondomiciliary who transacts business in New York, as long as the cause of action arises out of the subject matter of the business transacted. See N.Y. C.P.L.R. § 302(a)(1); *McGowan*, 52 N.Y.2d at 272 419 N.E.2d at 322-23, 437 N.Y.S.2d at 645.

The transacting business prong of § 302(a)(1) confers jurisdiction over "a defendant who purposefully avails itself of the

privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." *Viacom Intern., Inc. v. Melvin Simon Productions,* 774 F.Supp. 858, 862 S.D.N.Y. 1991). New York courts look to the totality of circumstances to determine whether the defendant has engaged in some purposeful activity in New York in connection with the matter in controversy. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.,* 15 N.Y.2d 443, 457, 209 N.E.2d 68, 75, 261 N.Y.S.2d 8, [**14] 18 (1965).

CPLR § 302(a)(1) authorizes the court to exercise jurisdiction over nondomiciliaries for contract and tort claims arising from a defendant's transactions of business in New York. *Kreutter v. McFadden Oil Corp.,* 71 N.Y.2d 460, 522 N.E.2d 40, 527 N.Y.S.2d 195 (1988). A single transaction of [*357] business is sufficient to give rise to jurisdiction under CPLR § 302(a)(1), even where the defendant never enters the state, if the claim arises out of the transaction.

> It [CPLR 302(a)(1)] is a "single act statute" and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Kreutter,* 71 N.Y.2d at 467, 522 N.E.2d at 43, 527 N.Y.S.2d at 198-99; see also *Parke-Bernet Galleries, Inc. v. Franklyn,* 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).
>
> Plaintiff does not provide any proof that any "business" Atlas transacted in New York is substantially related to Hamilton's exposure to asbestos products in the Norfolk Virginia Shipyard. Therefore, [**15] jurisdiction cannot be obtained over Atlas under § 302(a)(1).

2. Tortious Act Committed in New York

Section 302(a)(2) provides for jurisdiction over a defendant who "commits a tortious act within the state, causing injury to person or property within the state." N.Y. C.P.L.R. § 302(a)(2). New York courts take a narrow approach in determining

where the tort occurs. See *Feathers v. McLucas,* 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). "For a court to assert personal jurisdiction under this subsection of the long-arm statute, the tortious act must have been committed within New York.... This is tantamount to requiring the physical presence of the defendant or his agent within the state when the tort occurs." *Twine,* 746 F. Supp. at 1206.

The acts at issue cannot be deemed to have been tortious acts committed within New York State. Accordingly, § 302(a)(2) is inapplicable to this case.

3. Tortious Act Committed Outside the State

Section 302(a)(3) provides personal jurisdiction over a nondomiciliary who commits a tortious act without the state, causing injury within the state, if the nondomiciliary expects or should reasonably expect the acts [**16] to have consequences in the state and derives substantial revenue from interstate or international commerce, or if the nondomiciliary regularly solicits business in the state or derives substantial revenue from services rendered or goods sold within the state. See generally *Finest Fruits, Inc. v. Bertuca,* 714 F. Supp. 94, 98 (S.D.N.Y. 1989).

In Plaintiff's opposition to Atlas' initial motion to dismiss in August 1998, she contended that this section conferred jurisdiction over Atlas because Atlas had had contacts and solicited and transacted business within New York. Moreover, continued Plaintiff, it was reasonably foreseeable to Atlas that the sale of its asbestos products throughout the United States would have consequences within its various jurisdictions. Here, the issue is not various other jurisdictions but New York. Still, prior to reaching the issues that Plaintiff addressed, it must be found that Atlas' tortious act caused injury to Hamilton in New York. See *Cosmetech,* 943 F. Supp. at 319.

In the instant case, it is undisputed that Hamilton's exposure to Atlas products occurred in Virginia. The sole link to New York is the residence of the Plaintiff. Yet merely because [**17] Plaintiff is a resident of New York or because Hamilton

was treated in New York is insufficient to confer jurisdiction under § 302(a)(3). See *Mareno,* 910 F.2d at 1046 (2d Cir. 1990) (stating that injury "does not occur within the state simply because the plaintiff is a resident"); *Twine,* 746 F. Supp. at 1206 ("New York has strictly construed CPLR § 302(a)(3), refusing to exercise personal jurisdiction based solely on a plaintiff's residence or domicile with New York."); *McGowan,* 52 N.Y.2d at 274-75, 419 N.E.2d at 323, 437 N.Y.S.2d at 646 (finding that being a resident of the state is not enough under New York's long arm statute). That Plaintiff is domiciled in New York does not mean that the situs of the injury is New York. See *American Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.,* 439 F.2d 428 (2d Cir. 1971).

Here, the locale of Hamilton's injury is not New York but Virginia. In localizing the injury, a distinction is made between the [*358] situs of the injury and the place where the plaintiff suffers damages. It is well established that, for the purposes of § 302(a)(3), " 'the situs of the injury is the location of the original event which caused the injury, [**18] not the location where the resultant damages are subsequently felt by the plaintiff.' " *Mareno,* 910 F.2d at 1046 (quoting *Carte v. Parkoff,* 152 A.D.2d 615, 616, 543 N.Y.S.2d 718, 719 (2d Dep't 1989)). "As applied to noncommercial tort cases, the situs rule is meant to prevent parties from carrying injuries that occurred out of state back to New York in order to bring suit." *Ashley v. Abbott Labs.,* 789 F. Supp. 552, 570 (E.D.N.Y. 1992); see, e.g., *Twine,* 746 F. Supp. at 1206 (noting that where malpractice suit is based on treatment in defendant's out-of-state office, injury occurred out of state).

Thus, while Hamilton may have suffered from his mesothelioma in New York or became aware of the disease in New York, his "injury" under § 302(a)(3) did not occur in New York, but in Virginia where his exposure to asbestos took place. See *Diskin v. Starck,* 538 F. Supp. 877, 879 (E.D.N.Y. 1982) ("Plaintiffs cannot sustain jurisdiction under § 302(a)(3) merely by showing that as domiciliaries of this state, they suffered further damage (either economic or physical), on account of the earlier injuries sustained outside the state."); cf.

Ashley, 789 F. Supp. at 570-71, [**19] 592 (finding that the injury-causing event in a DES action was the mothers' ingestion of DES and therefore plaintiffs' "injury" occurred where plaintiffs were exposed to DES in utero); *Carrano v. Abbott Labs.,* 202 A.D.2d 6, 8, 615 N.Y.S.2d 882, 884 (1st Dep't 1994) (finding § 302(a)(3) satisfied where plaintiffs' mothers ingested DES in New York and plaintiffs were in utero in New York when the exposure to DES took place).

As a result, § 302(a)(3) cannot provide a basis for jurisdiction over Atlas.

III. Preservation of the Jurisdictional Defense

Lack of personal jurisdiction is a privileged defense that may be waived. As the Second Circuit recently stated:

> Waiver of the defenses of insufficiency of service of process and lack of personal jurisdiction is generally governed by Fed. R. Civ. P. 12(h)(1), which establishes that
>
> > [a] defense of lack of jurisdiction over the person, . . . insufficiency of process, or insufficiency of service of process is waived . . . if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.
> >
> > Rule 12(h)(1) [**20] "advises a litigant to exercise great diligence in challenging personal jurisdiction . . . or service of process. If he wishes to raise [either] of these defenses he must do so at the time he makes his first significant defensive move. . . ."

Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 729-30, 1998 U.S. App. LEXIS 31066, 1998 WL 854449, at *5-*6 (2d Cir. 1998) (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1391 (1990)).

In *Hamilton I,* it was recognized that Atlas had literally complied with Rule 12(h)(1) by asserting the defense of lack of jurisdiction in its answer. It was further recognized that undue

delay in challenging personal jurisdiction by a motion to dismiss may constitute a waiver. With regard to the question of waiver, this Court cited cases such as *Datskow v. Teledyne, Inc.*, 899 F.2d 1298 (2d Cir. 1990), all of which dealt with a defect in service of process. In distinguishing waiver of insufficiency of process as opposed to personal jurisdiction, the Datskow court explained that "this is not a case where defendant is contesting personal jurisdiction on the ground that long arm jurisdiction is not available. [**21] We would be slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court." *Id. at 1303.*

Plaintiff contended in *Hamilton I* that Atlas' delay in objecting to personal jurisdiction constituted waiver of that defense. While acknowledging that Plaintiffs claim had some support and that she had made a meaningful argument for waiver, the denial of Atlas' motion in *Hamilton I* was not based on its supposed waiver of the jurisdictional defense. If it had been, the jurisdictional [*359] issue would have been closed and Atlas would not have been given leave to renew its motion.

In *Hamilton I,* it was noted that, despite Plaintiffs representation, Multidistrict Litigation Rule 14, which states that "failure of a party to respond to a show cause order regarding remand shall be treated as that party's acquiescence to the remand," does not act as a "waiver" of the defense of personal jurisdiction. See *Hamilton I,* 1998 WL 651049, at *2. Additionally, while Atlas did delay in contesting the jurisdiction of this Court, this action as well as those with which it was consolidated were in limbo for a few years in the Eastern District of Pennsylvania. [**22] Granted, Atlas should have brought its motion sooner than it did. However, the delay was not substantial enough to warrant a finding of waiver. See *Datskow,* 899 F.2d at 1303.

Having carefully "re"-considered the waiver issue and Plaintiffs submissions, keeping in mind that Atlas included the defense in its answer and asserted it in its first significant motion, this Court finds that Atlas did not waive its right to contest jurisdiction.

Due to the dismissal of Atlas from this case on jurisdictional grounds, the remaining issues presented in Atlas' post-trial motions need not be reached.

Conclusion

For the reasons set forth above, Atlas' motion for dismissal on the ground of lack of personal jurisdiction is hereby granted. Because of the gravity of this decision following trial, leave to reargue is granted.

It is so ordered.

New York, N. Y.
December 29, 1998

ROBERT W. SWEET

U.S.D.J.

*1999 U.S. Dist. LEXIS 2796, **

LINDA **HAMILTON**, Individually and as Executrix of the Estate of GEORGE **HAMILTON**,
Plaintiff, - against - GARLOCK, INC., et al., Defendants.

94 Civ. 4397 (RWS)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1999 U.S. Dist. LEXIS 2796

March 9, 1999, Decided
March 11, 1999, Filed

DISPOSITION: [*1] Plaintiffs motion for reargument granted, Atlas's motion to dismiss for lack of personal jurisdiction granted.

CORE TERMS: reargument, interstate, situs, tortious act, personal jurisdiction, exposure, international commerce, lack of personal jurisdiction, motion to dismiss, mesothelioma, overlooked, discovery, asbestos, causing injury, preponderance, Local Rule, reconsideration, jurisdictional, ingestion, commits, nondomiciliary, persistent, regularly, exposed, exercise personal jurisdiction, controlling authority, interstate commerce, summary judgment, original motion, setting forth

COUNSEL: For Plaintiff: MOSHE MAIMON, ESQ., ALANI GOLANSKI, ESQ., CHRIS ROMANELLI, ESQ., Of Counsel, LEVY PHILLIPS & KONIGSBERG, New York, NY.

For Atlas Turner, Inc., Defendant: ROGER P. McTIERNAN, ESQ., Of Counsel, BARRY, McTIERNAN & MOORE, New York, NY.

JUDGES: ROBERT W. SWEET, U.S.D.J.

OPINION BY: ROBERT W. SWEET

OPINION: OPINION

Sweet, D.J.

Plaintiff Linda Hamilton ("Plaintiff") has moved for reargument of this Court's December 29, 1998, opinion dismissing

the complaint against defendant Atlas Turner Inc. ("Atlas") for lack of personal jurisdiction, for an order vacating that opinion, and a denial of Atlas's post-trial motion to dismiss. For the reasons set forth below, Plaintiff's motion for reargument, and Atlas's motion to dismiss are granted.

Parties

Plaintiff was married to George Hamilton ("Hamilton"). During his lifetime, Hamilton worked as a boilerman in the United States Navy.

Atlas was at all relevant times to this action a Canadian Corporation. It has never been authorized to conduct business in the State of New York.

Prior Proceedings [*2] **and Facts**

The prior proceedings and facts in this action have been set forth in two prior opinions of this Court, familiarity with which is assumed. See *Hamilton v. AC and S, Inc.*, 1998 U.S. Dist. LEXIS 14884, No. 94 Civ. 4397, 1998 WL 651049 (S.D.N.Y. Sept. 23, 1998) [hereinafter *Hamilton I*]; *Hamilton v. AC and S, Inc.*, 31 F. Supp. 2d 351, 1999 WL 4913 (S.D.N.Y. 1998) [hereinafter *Hamilton II*]. Those facts and prior proceedings relevant to the instant motion are set forth below.

Plaintiff's asbestos claim, naming several defendants including Atlas, was filed in federal court on June 15, 1994. An amended complaint was filed on December 14, 1995. This action is one of many that has been supervised by the Multidistrict Litigation Panel ("MDL") for discovery and pretrial purposes. It was originally filed in the Southern District of New York and subsequently transferred by order of the MDL to the Honorable Charles R. Weiner of the Eastern District of Pennsylvania. The action was transferred back to this Court on December 13, 1997, and thereafter consolidated by opinion dated May 7, 1998, with four other asbestos cases for trial.

The claims in this action were brought by Linda Hamilton, [*3] the widow of George Hamilton. Hamilton was diagnosed with a pleural effusion in January of 1992, and with mesothelioma in January of 1993. He died from the cancer on November 4, 1994, at the age of 54. He was survived by his

widow, Linda, and eight children, ages 32 to 4. Testimony established that Hamilton was exposed to asbestos when he served as a boilerman in the United States Navy from 1959 to 1961. He was stationed at the Norfolk Virginia Shipyard and served in the boiler room of the *U.S.S. John W. Weeks* (the *"Weeks"*).

Prior to the commencement of trial, Atlas brought a motion to dismiss for lack of personal jurisdiction, or in the alternative for summary judgment. The motion for summary judgment was denied, and the jurisdictional motion was denied with leave to renew upon a fuller record. See *Hamilton I,* 1998 WL 650149.

Trial commenced on September 23, 1998. On October 20, the jury returned a verdict for Plaintiff. Judgment in the amount of $4,288,427.47 was entered on November 6, 1998.

Atlas brought a trio of post-trial motions, including a motion to dismiss the complaint for lack of personal jurisdiction. In *Hamilton II,* it was found that Plaintiff had [*4] failed to establish, by a preponderance of the evidence, that this Court could exercise personal jurisdiction over Atlas. Specifically, Plaintiff had not demonstrated that Atlas was "doing business" in New York at the time the action was commenced within the meaning of § 301 of New York's Civil Practice Law and Rules ("CPLR"), see *Hamilton II,* 1999 WL 4913, at *3-*4; that Atlas transacted business in New York within the meaning of § 302(a)(1), see id. at *5-*6; that Atlas's tortious act was committed within the state of New York as required by § 302 (a)(2), see id. at *6; that the tortious act Atlas committed outside of New York caused Hamilton injury in New York as required by § 302(a)(3), see id. at *6-*7; or that Atlas had waived its defense of personal jurisdiction, see id. at *7-*8.

At the close of *Hamilton II,* Plaintiff was granted leave to reargue. See id. at *8. On February 3, 1999, Plaintiff's reargument motion was deemed fully submitted.

Discussion

I. Legal Standards for a Motion for Reargument

A motion for reargument is brought pursuant to Local Rule 6.3, which provides, in pertinent part: "There shall be

served [*5] with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." Thus, to be entitled to reargument and reconsideration, the movant must demonstrate that the Court overlooked controlling decisions or factual matters that were put before it on the underlying motion. See *Ameritrust Co. Nat'l Ass'n v. Dew,* 151 F.R.D. 237, 238 (S.D.N.Y. 1993); *Fulani v. Brady,* 149 F.R.D. 501, 503 (S.D.N.Y. 1993), aff'd sub nom. *Fulani v. Bentsen,* 35 F.3d 49 (2d Cir. 1994); *East Coast Novelty Co. v. City of New York,* 141 F.R.D. 245, 245 (S.D.N.Y. 1992); *B.N.E. Swedbank, S.A. v. Banker,* 791 F. Supp. 1002, 1008 (S.D.N.Y. 1992); *Novak v. National Broadcasting Co.,* 760 F. Supp. 47, 48 (S.D.N.Y. 1991); *Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n,* 624 F. Supp. 856, 857 (S.D.N.Y. 1985).

Local Rule 6.3 is to be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the court. See *American Alliance v. Eagle Ins.,* 163 F.R.D. 211, 213 (S.D.N.Y. 1995) (citing *Caleb & Co. v. E.I. DuPont De Nemours &Co.,* 624 F. Supp. 747, [*6] 748 (S.D.N.Y. 1985)). In deciding a reargument motion, the Court must not allow a party to use the motion as a substitute for appealing from a final judgment. See *Morser v. A.T.&T. Information Systems,* 715 F. Supp. 516, 517 (S.D.N.Y. 1989); *Korwek v. Hunt,* 649 F. Supp. 1547, 1548 (S.D.N.Y. 1986), aff'd, 827 F.2d 874 (2d Cir. 1987). Therefore, a party may not "advance new facts, issues or arguments not previously presented to the court." *Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Md.,* 768 F. Supp. 115, 116 (S.D.N.Y. 1991); see *Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb Inc.,* 1989 U.S. Dist. LEXIS 9145, No. 86 Civ. 6447, 1989 WL 162315, at *3 (S.D.N.Y. Aug. 4, 1989). The decision to grant or deny the motion is within the sound discretion of the district court. See *Schaffer v. Soros,* 1994 U.S. Dist. LEXIS 15508, No. 92 Civ. 1233, 1994 WL 592891 (S.D.N.Y. Oct. 31, 1994).

II. Upon Reargument, Atlas's Motion to Dismiss for Lack of Personal Jurisdiction Is Granted

Plaintiff's motion for reargument is premised on three distinct grounds. First, Plaintiff takes issue with the finding in Hamilton II that Atlas has not waived its jurisdictional defense. Second, essentially for the first time, Plaintiff [*7] suggests that jurisdiction exists under CPLR § 302(a)(2), in contrast with the determination in *Hamilton II* that Atlas's acts cannot be deemed to be tortious acts committed within New York. Third, Plaintiff asserts that the Court overlooked authority that held that in an asbestos case the situs of the injury may be deemed to be the situs in which the plaintiff contracted or became aware of his mesothelioma, as long as he did not travel to that situs for the purpose of bringing suit, rather than the locale of exposure.

A. Waiver

As regarding Plaintiff's first ground for reconsideration, she has failed to cite to any facts or controlling authority overlooked. Rejection of a party's assessment of the law or interpretation of a claim is not a proper ground on which to seek reargument or reconsideration. See *Farkas v. Ellis,* 783 F. Supp. 830, 833 (S.D.N.Y.), aff'd, 979 F.2d 845 2nd Cir. 1992); *Mina Investment Holdings Ltd. v. Lefkowitz,* 184 F.R.D. 245, 1999 U.S. Dist. LEXIS 487, 1999 WL 25050, at *6 (S.D.N.Y. 1999); see also *Lehmuller v. Incorporated Village of Sag Harbor,* 982 F Supp. 132, 135 (E.D.N.Y. 1997) (noting that "courts have reiterated that Rule 6.3 motion is [*8] not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved"). Again, a reconsideration motion may not be used as a substitute for appeal. See *Morser,* 715 F. Supp. at 517; *Korwek,* 649 F. Supp. at 1548.

B. Section 302(a)(2)

In formulating her argument as to why jurisdiction may exist under § 302(a)(2), Plaintiff, in violation of the parameters of Local Rule 6.3, "advance[s] new facts, issues, [and]

arguments not previously presented to the court." *Morse/Diesel,* 768 F. Supp. at 116.

Section 302(a)(2) provides for jurisdiction over a defendant who "commits a tortious act within the state, causing injury to person or property within the state." N.Y. C.P.L.R. § 302(a) (2). New York courts take a narrow approach in determining where the tort occurs. See *Feathers v. McLucas,* 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965). "For a court to assert personal jurisdiction under this subsection of the long-arm statute, the tortious act must have been committed within New York. . . . This is tantamount to requiring the physical presence of the defendant or his agent within the state when the tort [*9] occurs." *Twine v. Levy,* 746 F. Supp. 1202, 1206 (E.D.N.Y. 1990).

For the first time, Plaintiff submits that the *Weeks* made "a [sic] least three trips through New York waters during which periods Mr. Hamilton was continually exposed to the Atlas asbestos." (Pl.'s Mem. in Supp. of Reargument.) According to Plaintiff, a reasonable inference could be drawn that the voyages of the *Weeks* through New York's waters and to and from the states of Rhode Island and Maine brought that ship within New York State, such that the tortious act could be deemed to have been committed in New York.

Apart from the impropriety of this contention at this stage, there exists no evidence supporting the assertion that the *Weeks* did in fact come within the jurisdiction of New York during a time that Hamilton was exposed to Atlas's asbestos products such that the tortious act of Atlas can be said to have occurred in New York. It is important to keep in mind that at this stage of the action, a trial having been held, Plaintiff must establish personal jurisdiction by a preponderance of the evidence. See, *e.g., Marine Midland Bank, N.A. v. Miller,* 664 F.2d 899, 904 (2d Cir. 1981); *Hamilton* [*10] *II,* 1999 WL 4913, at *2; *Houbigant, Inc. v. ACB Mercantile., Inc.,* 914 F. Supp. 964, 980 (S.D.N.Y. 1995); *Kowalski-Schmidt v. CLS Mortgage, Inc.,* 981 F. Supp. 105, 108 (E.D.N.Y. 1997); *Roth v. El Al Israel Airlines, Ltd.,* 709 F. Supp. 487, 489 (S.D.N.Y. 1989). She has not done so.

C. Section 302(a)(3)

Plaintiff is on firmer ground as to her contention that the "injury" suffered by Hamilton may be deemed to have taken place in New York, rather than Virginia, which was the situs of the exposure to Atlas's asbestos products.

New York's long arm statute, CPLR § 302, provides in pertinent part:

> (a) As to a cause of action arising from any acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary . . . who in person or through an agent:
>
> . . . .
>
> 3. commits a tortious act without the state causing injury to person or property within the state ... if he
> (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
> (ii) expects or should reasonably expect the act to have consequences
> [*11] in the state and derives substantial revenue from interstate or international commerce . . . .

N.Y. C.P.L.R. § 302(a).

In *Hamilton II,* it was determined that the locale of Hamilton's injury was not New York but Virginia, because, for the purposes of § 302(a)(3), "'the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff.'" *Mareno v. Rowe,* 910 F.2d 1043, 1046 (2d Cir. 1990) (quoting *Carte v. Parkoff,* 152 A.D.2d 615, 616, 543 N.Y.S.2d 718, 719 (2d Dep't 1989)). In localizing the injury, a distinction is made between the situs of the injury and the place where the plaintiff suffers damages. "As applied to non-commercial tort cases, the situs rule is meant to prevent parties from carrying injuries that occurred out of state back to New York in order to bring suit." *Ashley v. Abbott Labs.,* 789 F. Supp. 552, 570 (E.D.N.Y. 1992).

Thus, in *Hamilton II*, it was concluded that "while Hamilton may have suffered from his mesothelioma in New York or became aware of the disease in New York, his 'injury' under § 302(a)(3) did not occur in New York, but [*12] in Virginia where his exposure to asbestos took place." *Hamilton II*, 1999 WL 4913, at *7 (citing, for example, *Ashley*, 789 F. Supp. at 570-71, 592 (finding that the injury-causing event in a DES action was the mothers' ingestion of DES and therefore plaintiffs' "injury" occurred where plaintiffs were exposed to DES in utero); *Carrano v. Abbott Labs.*, 202 A.D.2d 6, 8, 615 N.Y.S.2d 882, 884 (1st Dep't 1994) (finding § 302(a)(3) satisfied where plaintiffs' mothers ingested DES in New York and plaintiffs were in utero in New York when the exposure to DES took place)).

Plaintiff, however, suggests that the Court overlooked the analysis in *Penny v. United Fruit Co.*, 869 F. Supp. 122 (E.D.N.Y. 1994), which was cited in *Hamilton II* in setting out the standard for jurisdiction under § 301. In Penny, as here, defendant claimed that § 302(a)(3) did not confer jurisdiction because plaintiff had been exposed to asbestos without the state, although his mesothelioma manifested later while plaintiff was residing within the state of New York. See *id.* at 126. In straying from the idea that exposure equals injury for § 302(a)(3) purposes, the Penny court recognized [*13] that,

> since [plaintiff] suffered from mesothelioma, a rare form of cancer, he would have been barred under New York law from pressing a claim at the point of exposure, precisely because his claim would have been "contingent, speculative, or merely possible." It would be difficult indeed to conclude that [plaintiffs] injury was complete at the point of exposure, at a time when he would have had no cognizable cause of action.
>
> . . . .
>
> To characterize the manifestation of mesothelioma as merely "resultant damage" — or, as it is sometimes put, "derivative" — would merely be another attempt to claim

> that [plaintiff's] injury was somehow complete at the point of exposure, a conclusion that this Court rejects.

Id. at 127 (citations omitted).

In Ashley, cited in Hamilton II, it was held that as regarding DES, the "injury-causing event . . . was the mothers' ingestion of DES." *Ashley,* 789 F. Supp. at 591. In that case, the ingestion took place in New York. See id. Thus, the Ashley court was not confronted with the issue of whether a determination that the situs of the "injury" need not correspond with the situs of initial exposure would [*14] frustrate or contravene § 302(a)(3). The court did state, however, that

> where . . . an allegedly harmful drug is ingested in New York, or acts upon a resident of the state while the resident is in the state . . ., the situs of the injury is New York: there is no sense in which plaintiffs have merely carried their injuries into the state for the purpose of bringing suit.

Id. at 570 (emphasis added). In this vein, the Penny court reasoned that "since [plaintiff] became a citizen many years before his illness first appeared, his presence in New York could hardly be deemed transitory or motivated by a desire to better his chances in litigation." *Penny,* 869 F. Supp. at 128. Thus, the court concluded that "the alleged conduct caused injury in New York, thereby satisfying the initial requirement of CPLR § 302(a)(3) that the defendant committed a tortious act outside New York causing injury within New York." Id.

The analysis in Penny is applicable here. Hamilton was born in New York, and, as Plaintiff puts it, there was never any doubt that he would return to New York following his service in the Navy. Therefore, the policy behind the situs of injury [*15] rule as applied to non-commercial tort cases is not violated. The reasoning in Penny is sound and persuasive. Accordingly, Plaintiff has met his burden in establishing that Atlas's tortious conduct caused injury within New York.

However, the occurrence of an injury in New York by itself is not sufficient to provide a basis for personal jurisdiction under § 302(a)(3). "The purpose of the additional requirements of Sections 302(a)(3)(i) and (ii) is to ensure that

a defendant has sufficient contacts with New York that the defendant could reasonably anticipate being haled into a New York court." *Daniel v. American Board of Emergency Medicine,* 988 F. Supp. 127, 251 (W.D.N.Y. 1997) (citing *Montalbano v. Easco Hand Tools, Inc.,* 766 F.2d 737, 739 (2d Cir 1985); *Martinez v. American Standard,* 91 A.D.2d 652, 457 N.Y.S.2d 97, 98-99 (2d Dep't 1982), aff'd, 60 N.Y.2d 873, 458 N.E.2d 826, 470 N.Y.S.2d 367 (1983)). Plaintiff fails to carry her burden under § 302(a)(3)(i) and (ii).

Under § 302(a)(3)(i), a plaintiff must establish that the defendant regularly transacts business or "derives substantial revenue from goods used or consumed or services rendered, in the state." [*16] N.Y. C.P.L.R. § 302(a)(3)(i). First, the record is devoid of evidence to support the contention that Atlas derives "substantial revenue" in New York under § 302(a)(3)(i). As acknowledged by the Second Circuit, the year the complaint was filed, or 1994, is the proper point in time for this examination. See *Ball v. Metallurgie Hoboken-Overpelt, S.A,* 902 F.2d 194, 199-200 (2d Cir.1990).

Second, Plaintiffs submissions do not demonstrate that Atlas "regularly does or solicits business, or engages in any other persistent course of conduct" in New York. N.Y. C.P.L.R. § 302(a)(3)(i). Plaintiff contends that the deposition transcripts of Steve Jarosz and Stephen Gentry, and the affidavit of Peter Consorti, who testified that they recalled the use of Atlas asbestos-containing products in their work in New York in the 1950s, 1960s, or 1970s, satisfies the transacts business requirement. However, a study of the transcripts and affidavit reveals that Plaintiff has not shown that the contacts required in this section are "regular," "persistent" or "substantial." See, e.g., *Hearst Corp. v. Goldberger,* 1997 U.S. Dist. LEXIS 2065, No. 96 Civ. 3620, 1997 WL 97097, at *14 (S.D.N.Y. Feb. 26, 1997). Accordingly, a [*17] claim under § 302(a)(3)(i) must fail.

Section 302(a)(3)(ii) provides personal jurisdiction over a nondomiciliary who commits a tortious act without the state, causing injury within the state, if the nondomiciliary has reason to foresee that its actions will produce foreseeable consequences in the state and derives substantial revenue from

interstate or international commerce. See *Black v. Rawlings Constr. Co.*, 1997 U.S. Dist. LEXIS 3636, No. 93 Civ. 8643, 1997 WL 150121, at *4 (S.D.N.Y. Mar. 28, 1997); *Cosmetech International, LLC v. Der Kwei Ent.*, 943 F. Supp. 311 (S.D.N.Y. 1996); *Finest Fruits, Inc. v. Bertuca*, 714 F. Supp. 94, 98 (S.D.N.Y. 1989); *Sybron Corp. v. Wetzel*, 46 N.Y.2d 197, 206, 385 N.E.2d 1055, 413 N.Y.S.2d 127 (1978). The failure to establish any one of these elements is fatal to the Court's jurisdiction. See *Black*, 1997 WL 150121, at *4; *Ronar v. Wallace*, 649 F. Supp. 310, 316 (S.D.N.Y. 1986); *Trafalgar Capital Corp. v. Oil Producers Equip. Corp.*, 555 F. Supp. 305, 310 (S.D.N.Y. 1983).

Here, Plaintiff's failure to establish, by a preponderance of the evidence, that Atlas derives substantial revenue from interstate or international commerce defeats her assertion of [*18] jurisdiction under § 302(a)(3)(ii). Therefore, the other requirements need not be addressed. See, e.g., *Ronar*, 649 F. Supp. at 316 ("If the court finds that plaintiff has failed to make an adequate showing of substantial revenue, it need not reach the first three elements."); *Balaban v. Wescott*, 1996 U.S. Dist. LEXIS 22316, No. 96 CV. 3177, 1996 WL 599722, at *4 (E.D.N.Y. Oct. 7, 1996) (same).

"The long-arm statute is careful to require that the defendant derive substantial revenue from interstate [or international] commerce, and imposes the burden on the party seeking to establish jurisdiction to establish also that the statutory requirements have been met." *KIC Chemical, Inc. v. ADCO Chemical Co.*, 1996 U.S. Dist. LEXIS 3244, *22-*23, 95 Civ. 6321, 1996 WL 122420, at *8 (S.D.N.Y. Mar. 20, 1996); see *Bank of California v. Smith Barney, Inc.*, 1997 U.S. Dist. LEXIS 19135, No. 89- CV-551, 1997 WL 736529, at *5 (N.D.N.Y. Oct. 31, 1997); *Black*, 1997 WL 150121, at *5; *Balaban*, 1996 WL 599722, at *4; *Ronar*, 649 F. Supp. at 316.[1]

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1. In papers submitted by Plaintiff opposing the original motion to dismiss prior to trial, she asserts that the burden is not on her to establish this element but on Atlas. The two cases she cites, however, are neither controlling nor supportive of her conclusion, especially given the stage that this litigation is in. The courts in both *Gillmore v. J. S. Inskip, Inc.*, 54 Misc. 2d 218, 282 N.Y.S.2d 127 (Sup. Ct. 1967), and *Tonelli v. Chase Manhattan Bank*,

The determination of whether revenue is "substantial" under New York law is made on both relative and absolute scales. See *id.; Vecchio v. S&T Manufacturing Co.*, 601 F. Supp. 55, 57 (E.D.N.Y. 1984); *Allen v. Canadian General Electric Co.*, 65 A.D.2d 39, 410 N.Y.S.2d 707, 708-09 (3d Dep't 1978), aff'd, 50 N.Y.2d 935,409 N.E.2d 998, 431 N.Y.S.2d 526 (1980). It requires examination of either the percentage of defendant's revenues from interstate or international commerce or the absolute amount of revenue generated by the interstate or international commercial activities. See *Ronar,* 649 F. Supp. at 316. In any event, some numerical figure is required.

Plaintiff has not offered any evidence regarding the "magnitude or source" of Atlas's interstate or international revenues. See *Bank of California,* 1997 WL 736529, at *5 ("Plaintiff does not detail or offer evidence regarding the magnitude or source of defendants' interstate revenues, however, and its jurisdictional claim under §302(a)(3)(ii) would fail on this omission alone."); *Black,* 1997 WL 150121, at *5 (explaining that a conclusory statement that defendant derives substantial revenue from interstate commerce, [*20] without providing evidence to support that contention is insufficient; therefore dismissing claim for lack of personal jurisdiction); *Balaban,* 1996 WL 599722, at *4 (finding inadequate the general assertion in plaintiff's memorandum of law that defendants derive substantial revenue by their sale of paintings, without showing, inter alia, that the proceeds constituted "substantial revenue" to defendant); *KIC,* 1996 WL 122420, at *8 (finding that plaintiff had not established personal jurisdiction over defendant

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NOTES *(Continued)*

N.A., 49 A.D.2d 731, 372 N.Y.S.2d 662 (1st Dep't 1975), were confronted with motions to dismiss in the early stages of those litigations. Indeed, in Tonelli, it was determined that "the failure of the plaintiff to come forward with substantial proof at this time should not mean that defendant must prevail on the motion. Subsequent discovery will surely cure this flaw." *Tonelli,* 49 A.D. 2d at 731, 372 N.Y.S.2d at 663. In the instant case, discovery has been had, a trial has been completed, and a verdict has been rendered. No controlling authority has been provided to indicate that the burden of showing insubstantial revenue from interstate and international commerce is defendant's to carry.

because he did not offer any evidence to demonstrate substantial revenue and merely asserted in a conclusory manner that defendant "must derive revenue from interstate commerce").

In the absence of any evidence of the relative portion of Atlas's revenues that are derived from interstate or international commerce, or the overall size of Atlas's revenues, this Court has no basis to find that Atlas derives "substantial" revenues from interstate or international commerce. Accordingly, Plaintiff has failed to meet her burden of establishing — with anything more than speculation — by a preponderance of the evidence, that personal jurisdiction exists over Atlas.

Plaintiff, [*21] in the various briefs filed regarding the motion to dismiss for lack of personal jurisdiction, has urged that she has an excuse for failing to establish the requisite elements of jurisdiction, in that Atlas has failed to produce the appropriate information. According to Plaintiff, the reason this Court lacks sufficient facts is Atlas's abuse of discovery. However, the proper avenue for Plaintiff would have been to make a motion to compel the documents setting forth the information needed to establish personal jurisdiction. She did not do so. It was Plaintiff's burden, and not Atlas's, to establish each element required to show the propriety of exercising jurisdiction over Atlas. Indeed, in Hamilton I, Plaintiff was alerted to her deficiency in this regard and allowed every opportunity to cure the defect. As discovery, as well as the evidence elicited at trial, did not reveal facts sufficient for this Court to exercise jurisdiction over Atlas, the complaint against it is dismissed.

Conclusion

For the reasons set forth above, Plaintiff's motion for reargument having been granted, Atlas's underlying motion to dismiss for lack of personal jurisdiction is granted. [*22]

It is so ordered.

New York, N. Y.
March 9, 1999

ROBERT W. SWEET

U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1999

Argued: October 12, 1999 Decided: NOV 22 1999

Docket No. 99-7335

LINDA HAMILTON, individually and as Executrix of the Estate of George Hamilton,

Plaintiff-Appellant,

v.

ATLAS TURNER, INC.,

Defendant-Appellee,

Before: WINTER, *Chief Judge,* NEWMAN, *Circuit Judge,* and KEENAN,* District Judge.

Appeal from the March 16, 1999, judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, Judge), dismissing complaint, after jury verdict in plaintiff's favor, for lack of personal jurisdiction. Appellant contends that personal jurisdiction defense was forfeited.

Reversed and remanded.

Alani Golanski, New York, N.Y. (Moshe Mainon, Levy, Phillips & Konigsberg, New York, N.Y., on the brief), for plaintiff-appellant.

Roger P. McTiernan, New York, N.Y. (Laurel A. Wedinger, William E. Fay, III, Barry, McTiernan & Moore, New York, N.Y., on the brief), for defendant-appellee.

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*Honorable John F. Keenan, of the United States District Court for the Southern District of New York, sitting by designation.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents the issue whether a defendant in a diversity action waived, or more precisely, forfeited its defense of lack of personal jurisdiction. Plaintiff-Appellant Linda Hamilton appeals from the March 16, 1999, judgment of the District Court for the Southern District of New York (Robert W. Sweet, District Judge), dismissing her complaint against the Defendant-Appellee, Atlas Turner, Inc. ("Atlas") , for lack of personal jurisdiction under New York's long-arm statute, after a jury returned a verdict in her favor. Her lawsuit alleged the wrongful death of her husband from asbestos. We conclude that Atlas forfeited its defense of lack of personal jurisdiction by participating in extensive pretrial proceedings and forgoing numerous opportunities to move to dismiss during the four-year interval that followed its inclusion of the defense in its answer. We therefore reverse and remand for consideration of Atlas's other grounds for resisting entry of judgment in Plaintiff-Appellant's favor.

Background

In 1992 and in 1993, George Hamilton was diagnosed with pleural effusion and mesothelioma, respectively. In June 1994, Hamilton filed the instant action in the District Court against, among other defendants, Atlas Turner Inc., a Canadian corporation. The complaint alleged that Atlas was one of the manufacturers of the asbestos products to which Hamilton was exposed from 1959 to 1961 when he worked for the United States Navy as a boilerman. In July 1994, Atlas filed its answer, which included the defense that the Court lacked personal jurisdiction over Atlas. Hamilton died in November 1994, at age 54. In that same month, the Multidistrict Litigation Panel ("MDL") transferred this and many other similar actions to the Eastern District of Pennsylvania for pretrial proceedings. In December 1997, more than three years later, the MDL transferred the action back to the Southern District of New York.

In August 1998, Atlas moved to dismiss, arguing that the District Court lacked personal jurisdiction under New York's long-arm statute, *see* N.Y. C.P.L.R. 301-302 (McKinnney

1990). The District Court denied the motion, noting that "discovery is incomplete in this area" and that "the motion may be renewed upon a fuller record." *Hamilton v. AC and S, Inc.*, No. 94 Civ. 4397 RWS, 1998 WL 651049, at *3 (S.D.N.Y. Sept. 23, 1998). In October 1998, after a trial on the merits, the jury returned a verdict awarding more than $4 million to the Plaintiff-Appellant, the executrix of Hamilton's estate. Atlas again moved to dismiss for lack of personal jurisdiction. This time, the District Court granted the motion, ruling that Atlas had not implicitly waived the issue and that the Plaintiff-Appellant had not established personal jurisdiction under New York's long-arm statute by a preponderance of the evidence. *See Hamilton v. Garlock, Inc.*, 31 F. Supp. 2d 351 (S.D.N.Y. 1998). On rehearing, the District reaffirmed, though on different grounds, its ruling that Hamilton had not established personal jurisdiction. *See Hamilton v. Garlock, Inc.*, No. 94 CIV. 4397 (RWS), 1999 WL 135203, at *5-8 (S.D.N.Y. Mar. 11, 1999).

Discussion

The District Court's ruling that Atlas did not waive personal jurisdiction is reviewed for abuse of discretion. *See United States v. Ziegler Bolt and Parts Co.*, 111 F.3d 878, 883 (Fed. Cir. 1997). It is undisputed that Atlas met the formal requirements of Fed. R. Civ. P. 12(h)(1) by including in its answer the following sentence: "The Court lacks personal jurisdiction over Atlas." However, this Court has ruled that a "delay in challenging personal jurisdiction by motion to dismiss" may result in waiver, "even where . . . the defense was asserted in a timely answer." *Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1303 (2d Cir. 1990); *see Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998) ("Rule 12(h)(1) specifies the minimum steps that a party must take in order to preserve a defense."); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-97 (7th Cir. 1993) (finding waiver of personal jurisdiction defense by defendant's conduct, though acknowledging that "the waiver provided for by Rule 12(h) did not occur").

In *Datskow*, we held that a defendant waived the defense of improper service by participating in litigation without raising the personal jurisdiction issue until four months after raising the issue in its answer. We noted, however, " [T]his is not a case where a defendant is contesting personal jurisdiction on the ground that long-arm jurisdiction is not available. We would be slower to find waiver by a defendant wishing to contest whether it was obliged to defend in a distant court." *Datskow,* 899 F.2d at 1303. Since Atlas's jurisdictional defense challenges the application of New York's long-arm statute, we approach the waiver issue with the enhanced caution that *Datskow* contemplated.

Initially, we note that the issue is more properly considered one of forfeiture than of waiver. The term "waiver" is best reserved for a litigant's intentional relinquishment of a known right. Where a litigant's action or inaction is deemed to incur the consequence of loss of a right, or, as here, a defense, the term "forfeiture" is more appropriate. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))); *Swaim v. Moltan Co.*, 73 F.3d 711, 718 & n.4 (7th Cir. 1996) (personal jurisdiction "forfeited" if not timely asserted). Also as a preliminary matter, we observe that whether forfeiture has occurred is a matter of federal procedural law, *see Yeldell v. Tutt*, 913 F.2d 533, 538-39 (8th Cir. 1990); Atlas gains no support from somewhat lenient New York law concerning forfeiture of a personal jurisdiction defense. *See Calloway v. National Service Industries, Inc.*, 93 A.D.2d 734, 735, 461 N.Y.S.2d 280, 282 (1st Dep't) (faulting *plaintiff* for not promptly moving to strike defendant's defense, which was included in answer but not pursued for six years), *aff'd*, 60 N.Y.2d 906, 470 N.Y.S.2d 583 (1983).

In assessing whether forfeiture in this case not only occurred but was so clear that the District Judge exceeded his allowable discretion in ruling that forfeiture had not occurred, we consider all of the relevant circumstances. We start with the considerable length of time—four years—between the

assertion of the defense in the answer and the litigation of the defense in a motion. Although the passage of time alone is generally not sufficient to indicate forfeiture of a procedural right, *see, e.g., PPG Industries, Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 108 (2d Cir. 1997) (delay in demanding arbitration); *Grammenos v. Lemos*, 457 F.2d 1067, 1071 (2d Cir. 1972) (delay in making effective service), the time period provides the context in which to assess the significance of the defendant's conduct, both the litigation activity that occurred and the opportunities to litigate the jurisdictional issue that were forgone. *See Peterson*, 140 F.3d at 1318 ("Most defenses, including the defense of lack of personal jurisdiction, may be waived as a result of the course of conduct pursued by a party during litigation.").

Considerable pretrial activity occurred in this case. From July to November 1994, prior to the MDL transfer, some discovery took place, including the deposition of Plaintiff-Appellant's decedent. Moreover, considerable activity occurred in the transferee jurisdiction, including merits discovery and settlement conferences. Most significantly, Atlas had four distinct opportunities to move to dismiss during the four-year interval.

First, Atlas could have moved during the five months prior to the MDL transfer. Though such a motion would likely have encountered the Plaintiff-Appellant's demand for discovery on the jurisdictional issue, the motion would have served to precipitate such discovery and led to a discovery deadline and a prompt resolution of the issue.

Second, when the prospect of an MDL transfer arose, Atlas could have objected on jurisdictional grounds to including this case, or at least sought to defer its inclusion in the transfer until the jurisdictional issue was resolved. Instead, Atlas joined with other defendants in asking the MDL to effect the transfer. *Cf. Lomaglio Associates, Inc. v. LBK Marketing Corp.*, 876 F. Supp. 41, 43-44 (S.D.N.Y. 1995) (defendant's invoking authority of district court by removal petition deemed sufficient to forfeit personal jurisdiction defense).

Third, during the three years that this and similar cases were pending before the MDL, Atlas could have raised its

jurisdictional challenge before the transferee court. Congress provided for the transfer of actions pending in different districts "to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407 (a). The MDL panel itself has construed the term "pretrial proceedings" to include a motion to dismiss for lack of personal jurisdiction. *See In re Gypsum Wallboard*, 302 F. Supp. 794, 794 (J.P.M.L. 1969) (rejecting opposition to transfer based on alleged lack of personal jurisdiction of the transferor court, because "[m]otions to . . . dismiss for lack of jurisdiction are being routinely considered by courts to which multidistrict litigation has previously been transferred and we see no good reason why [the defendant] can not pursue its remedies following transfer") (footnotes omitted); *cf. In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1435 (2d Cir. 1993) (noting that "the transferee judge has all the pretrial jurisdiction the transferor judge would have had if the transfer had not occurred"); *Stirling v. Chemical Bank*, 382 F. Supp. 1146, 1150 (S.D.N.Y. 1974) (adjudicating, as transferee court, defendants' motions to dismiss for lack of subject matter jurisdiction and failure to state a claim), *aff'd*, 516 F.2d 1396 (2d Cir. 1975). *See generally* 15 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3866 (2d ed. Supp. 1999) ("Transferee courts have ruled on a wide range of preliminary legal and factual questions, such as motions to amend under Rule 15; motions to intervene under Rule 24; motions to dismiss for lack of jurisdiction, venue, or failure to state a claim; and motions for summary judgment.") (footnotes omitted). Moreover, the terms of the transfer order in this case did not limit the broad authority of the transferee court over "pretrial proceedings." At no time during the three years this case was in the transferee court did Atlas move to dismiss for lack of personal jurisdiction, not even when the Eastern District of Pennsylvania considered transferring this action back to the Southern District of New York.

Finally, Atlas could have raised the personal jurisdiction issue promptly after this action was returned to the Southern District of New York in December 1997. In late March 1998, Atlas opposed the Plaintiff-Appellant's motion to consolidate this case with six other cases then recently transferred from

the Eastern District of Pennsylvania. In April 1998, the District Court set a preliminary trial date for mid-June 1988. Neither of these events prompted Atlas to move to dismiss. Its motion was not filed until August 1998, seven months after the case returned to the Southern District of New York.

In sum, Atlas participated in pretrial proceedings but never moved to dismiss for lack of personal jurisdiction despite several clear opportunities to do so during the four-year interval after filing its answer. These circumstances establish a forfeiture. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (personal jurisdiction defense "may be lost by failure to assert it seasonably"); *Continental Bank, N.A.*, 10 F.3d at 1297 (personal jurisdiction defense lost where defendants "participated in lengthy discovery, filed various motions and opposed a number of motions" and "fully participated in litigation of the merits for over two-and-a-half years without actively contesting personal jurisdiction").

At oral argument, Atlas contended that it did not move to dismiss on personal jurisdiction grounds until August 1998, because if it had, the plaintiff would simply have argued that discovery was not yet complete. However, Atlas never gave the Eastern District of Pennsylvania the opportunity to consider such an objection or to respond to it by setting a discovery deadline. By withholding its motion, Atlas gambled that it could raise the personal jurisdiction issue on the eve of trial, in case a trial occurred. After considering all the circumstances of this case, we conclude not only that Atlas forfeited its personal jurisdiction defense, but also that this is the rare case where a district judge's contrary ruling exceeds the bounds of allowable discretion. Accordingly, the judgment is reversed, and the case remanded to afford the District Court an opportunity to consider Atlas's other challenges to entry of judgment on the verdict.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 31st day of January 2000.

Hamilton,

Plaintiff-Appellant,

v.

Atlas Turner, Inc.

Defendant-Appellee.

FILED JAN. 31, 2000
U.S. Court of Appeals
Second Circuit

Dkt No: 99-7335

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Atlas Turner.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)	CIVIL ACTION NO. MDL 875
This Document Relates To: Law Firm of Levy Phillips & Konigsberg United States District Court Southern District of New York *CARUOLO*, 93 CV 3752 *COCHRANE*, 92 CV 8841 *DUBBS*, 94 CV 0616 *FIALKOW*, 94 CV 0145 *HAMILTON*, 94 CV 4397 *JAMIESON*, 93 CV 7957 *TRUAX*, 93 CV 7622	FILED NOV. 7, 1997 MICHAEL E. KUNZ, Clerk By _____ Dep. Clerk

SHOW CAUSE ORDER

THE COURT, having received plaintiffs' motion for remand of these serious cases, and having held several settlement conferences, HEREBY ORDERS all remaining parties in the referenced cases to appear before this Court and SHOW CAUSE, if there be any, why these actions should or should not be transferred immediately back to the transferor jurisdiction for trial and other necessary action. The hearing shall be held *on Tuesday, December 16, 1997 at 10:30 o'clock, AM,* in Courtroom 6B, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania 19106. *Plaintiff's counsel shall immediately send notice to all remaining parties in these actions.*

BY THE COURT:

Date: 11/1/97

/s/ CHARLES R. WEINER, J.

CHARLES R. WEINER, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: ASBESTOS PRODUCTS LIABILITY LITIGATION (NO. VI)	CIVIL ACTION NO. MDL 875
This Document Relates To: Malignancy Cases from the law firm of Levy, Phillips & Konigsberg Southern District of New York 1. *COCHRANE*, 92 CV 8841 2. *CARUOLO*, 93 CV 3752 3. *TRAUX*, 93 CV 7622 4. *JAMIESON*, 93 CV 7957 5. *FIALKOW*, 94 CV 0145 6. *DUBBS*, 94 CV 0616 7. *HAMILTON*, 94 CV 4397	FILED DEC. 17, 1997 MICHAEL E. KUNZ, Clerk By _____ Dep. Clerk

TRANSFER

THIS MATTER being reviewed this date upon the Court's Show Cause Order and the Court having examined the matter and having held several settlement conferences in these matters, and further having an opportunity to receive responses from the parties; and

THE COURT FINDS the following conditions present:

a) The parties to these actions have engaged in settlement negotiations which have resolved these cases as to some defendants but not all, and

b) In order to complete the resolution of these actions they should be returned to the transferor court for completion of necessary discovery, further mediation, A.D.R. or other proceedings;

THE COURT FURTHER FINDS that the issue of punitive damages must be resolved at a further date with regard to the entire MDL action, and therefore any claims for punitive or exemplary damages are hereby ORDERED severed from these cases and retained by the Court within its jurisdiction over MDL 875 in the Eastern District of Pennsylvania.

THE COURT ALSO FINDS that the United States District Court for the Southern District of New York is a district wherein these actions may have originally been brought, and that for the convenience of the parties and in the interest of justice these actions should returned there for further proceedings.

THE COURT THEREFORE ORDERS, pursuant to Section 1404(a), Title 28, United States Code, that the above-entitled actions be TRANSFERRED to the United States District Court for the Southern District of New York for further proceedings.

BY THE COURT:

/s/ CHARLES R. WEINER, J.

CHARLES R. WEINER J.

Date: December 16, 1997

XC: liaison counsel
Certified copies USDC NYS

ENTERED: 12/18/97

CLERK OF COURT